Supreme Court, U.S.
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No.

In the Supreme Court of the United States

LINDA GILBERT,

Petitioner,

v.

DAIMLER CHRYSLER CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan

PETITION FOR WRIT OF CERTIORARI

MARK R. BENDURE
Counsel of Record

BENDURE & THOMAS
645 GRISWOLD
SUITE 4100
DETROIT, MI 48226
(313) 961-1525

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTION PRESENTED

WHETHER THE FOURTEENTH AMENDMENT'S DUE PROCESS GUARANTEE OF AN IMPARTIAL DECISION MAKER IS INFRINGED WHEN A LITIGANT'S FATE IS RELEGATED TO STATE SUPREME COURT JUSTICES WHO HAVE RECEIVED AN ESTIMATED $3,000,000 IN CAMPAIGN BENEFITS FROM AN AMICUS WHICH SUPPORTS ITS MEMBER, PETITIONER'S ADVERSARY, AND WHERE THOSE JUSTICES HAVE PUBLICLY VILIFIED PETITIONER'S COUNSEL AND PREDICATED THEIR CAMPAIGN ON CRITICISM OF PETITIONER'S COUNSEL, WHO WAS NOT THEN A CANDIDATE FOR PUBLIC OFFICE.

PARTIES TO PROCEEDINGS

Petitioner LINDA GILBERT[1] was the first female journeyman millright to work at Chrysler Corporation's Jefferson North Assembly Plant. She was subjected to a course of sexual harassment for which she sought recovery under Michigan's Elliott-Larsen Civil Rights Act, M.C.L. 37.2102, *et. seq.* Following an extended trial, she received a substantial verdict which was upheld by the trial court [166a-213a] and affirmed by the Michigan Court of Appeals [93a-165a].

Throughout proceedings in the Michigan State courts, Petitioner was represented by Geoffrey Fieger, Esq. Mr. Fieger had attained considerable notoriety and was the Michigan Democratic Party's nominee for Governor in the 1998 election, when he was defeated by John Engler, the incumbent Republican nominee. Mr. Fieger and his firm have an economic interest in the outcome of this Petition.

Respondent DAIMLER CHRYSLER CORPORATION is the corporate successor to Chrysler Corporation, Ms. Gilbert's employer. Respondent is a member of the Michigan Chamber of Commerce, which reportedly contributed about

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[1] Following the Michigan Supreme Court decision, and while a Motion for Rehearing was pending, Ms. Gilbert died of a heart attack. The Court was notified of her death, but no formal substitution of parties was effectuated. If *certiorari* is granted, Petitioner will seek to substitute the Personal Representative of her Estate as the named Petitioner.

$3,000,000 toward the successful 2000 election campaigns of three Michigan Supreme Court Justices: Hon. Robert Young, Hon. Clifford Taylor, and Hon. Steven Markman. All three were initially appointed to judgeships by Gov. Engler, were nominated by the Republican Party for the 2000 election, were beneficiaries of a television ad devised by the Chamber of Commerce's counsel, and conducted their campaign by expressly attacking Mr. Fieger.[2]

After denying the recusal motion which is the focus of this Petition, the Michigan Supreme Court, in a 4 to 3 decision, reversed the verdict and awarded Daimler Chrysler a new trial. The four Justices in the majority had been the subject of the recusal motion.[3] The three Justices whose recusal was not sought dissented from the new trial grant.[4]

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[2]Mr. Fieger was **not** a candidate for election in 2000.

[3]The fourth Justice, Hon. Maura Corrigan, was also an Engler appointee, and had previously filed a Request for Investigation with the Michigan attorney discipline officials seeking an investigation of Mr. Fieger which could lead to his disbarment.

[4]The remaining Justices would have granted remittitur but not a new trial.

CORPORATE DISCLOSURE STATEMENT

Petitioner LINDA GILBERT, makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   No

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OPINIONS AND ORDERS BELOW

Following the trial, the trial judge denied Respondent's motions seeking post-trial relief [166a-213a]. That Opinion is unpublished.

On July 30, 2002, the Michigan Court of Appeals issued its unanimous Opinion affirming [93a-165a]. That Opinion (2002 Mich App LEXIS 1168) is not published in the official Michigan Appeals Reports or Northwest 2d volumes. The Court of Appeals Order denying Respondent's Motion for Rehearing is also unpublished.

On April 8, 2003, the Michigan Supreme Court granted Respondent's Application for Leave to Appeal and the Motions of the Michigan and national Chambers of Commerce for leave to participate as *Amici Curiae*.[5] That Order is published as *Gilbert v. Daimler Chrysler Corp.*, 468 Mich. 883; 661 N.W.2d 232 (2003) (91a-92a).

Petitioner then filed a Motion seeking the recusal of Justices Young, Markman, Taylor and Corrigan, or an evidentiary hearing. The Court denied both recusal and an evidentiary hearing, *Gilbert v. Daimler Chrysler Corp.*, 469 Mich. 883; 669 N.W.2d 265 (2003) (78a-90a). The Court also denied Petitioner's Motion for Rehearing, *Gilbert v. Daimler Chrysler Corp.*, 469 Mich. 889; 670 N.W.2d 560 (2003) (70a-77a).

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[5] The Chambers had not participated in the case until it reached the Michigan Supreme Court.

The Michigan Supreme Court decision of the appeal is reported as *Gilbert v. Daimler Chrysler Corp.*, 470 Mich. 749; 685 N.W.2d 391 (2004) (3a-69a). Its denial of rehearing is reported as *Gilbert v. Daimler Chrysler Corp.*, 472 Mich. 1201; 691 N.W.2d 436 (2005) (1a-2a).

SUPREME COURT JURISDICTION

The published decision of the Michigan Supreme Court was issued on July 22, 2004. Petitioner sought rehearing within the applicable 21 day period of M.C.R. 7.313(D). The Court docketed the Motion for Rehearing and issued its Order denying the Motion for Rehearing on January 28, 2005. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1257(a), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

This Petition, filed within 90 days of the Michigan Supreme Court Order denying rehearing, is timely under this Court's Rule 13.3.

CONSTITUTIONAL PROVISION INVOLVED

Petitioner's central argument is that the participation of Justices who have been the beneficiaries of about $3,000,000 in campaign contributions from its adversary's Amicus, and who have publicly vilified Petitioner's counsel, violates the right to an impartial tribunal under the Fourteenth Amendment to the Constitution of the United States. In pertinent part, that Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[Fourteenth Amendment, § 1]

STATEMENT OF THE CASE

The Underlying Suit

This Petition focuses on the participation of Justices of the Michigan Supreme Court who were financially beholden to the Chamber of Commerce, an organization to which Respondent belongs, and which the Court allowed to participate as Amicus Curiae on behalf of Respondent. As the underlying suit is peripheral to that issue, the background of that case can be briefly summarized.

Ms. Gilbert, the first female millright, was subjected to a host of indignities which, she alleged, constituted a hostile work environment on the basis of her gender. These included lewd "cartoons" and "poems", a photograph of a penis, references by a male worker to his "big meat", vulgarities, urination on her chair, and other misconduct recounted at length in the Michigan Court of Appeals Opinion (94a-116a).

Proceedings Prior To The Chamber Of Commerce Involvement

After an extended trial, the jury returned a $21,000,000 verdict for Petitioner. The trial court denied Respondent's post-trial motions (166a-213a). In turn, the Michigan Court of Appeals unanimously affirmed (93a-165a). Consequently, prior to the involvement of the Chambers of Commerce, all judges and jurors concluded that Petitioner was entitled to recover.

The Background Facts Regarding Petitioner's Counsel And Michigan Supreme Court Justices Taylor, Markman, Young And Corrigan

In the early 1990's, Geoffrey Fieger, the trial attorney for Linda Gilbert in this case, represented Dr. Jack Kevorkian. Dr. Kevorkian was an outspoken advocate, and practitioner, of physician-assisted suicide. His views and activities were the focus of considerable controversy and media attention.

John Engler, who was then Michigan's Governor, was an opponent of Dr. Kevorkian and his views. In March of 1992, Governor Engler appointed to the Court of Appeals Hon. Clifford Taylor and Hon. Maura Corrigan (193 Mich App vi,

vii).[6] Both later became members of the Michigan Supreme Court to which this case of Linda Gilbert was presented.

Less than one year later, in February of 1993, Governor Engler signed legislation aimed at outlawing the physician-assisted suicide activities of Dr. Kevorkian. On a radio show that month, Governor Engler advocated the disbarment of Mr. Fieger to curtail the activities of Dr. Kevorkian (Ex. A,[7] audiotape; Ex. B, transcript of audiotape) (234a). In response to a caller's question about what would stop Dr. Kevorkian, Governor Engler publicly stated:

> "We probably could stop him if his lawyer were disbarred."

The legislation referred to on that occasion came before the Michigan Court of Appeals in *Hobbins v. Attorney General*, 205 Mich. App. 194; 518 N.W.2d 487 (1994). Judges Taylor and Fitzgerald of the Court of Appeals sat on the panel with visiting Judge Shelton. Mr. Fieger represented Dr. Kevorkian in the *Hobbins* case. In pertinent part, over the dissent of Judge Shelton, Judges Taylor and Fitzgerald voted to uphold the constitutionality of the statute. Mr.

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[6] Governor Engler would later appoint Justice Taylor to the Michigan Supreme Court in the fall of 1997 (456 Mich ccxxxiv - ccxxxviii).

[7] Alphabetic Exhibit designations refer to Exhibits filed with and in support of the Motion for Recusal. All are part of the record in the Michigan Supreme Court, and some have been separately reproduced as part of the Appendix filed with this Petition.

Fieger responded with public comments highly critical of Judge (now Justice) Taylor and Judge Fitzgerald.

The following year, 1995, Governor Engler appointed Hon. Steven Markman (208 Mich App xiv) and Hon. Robert Young (213 Mich App at vii) to the Court of Appeals. Both have since become members of the Michigan Supreme Court. In short, by 1995, four of the members of the Michigan Supreme Court had been appointed to appellate judgeships by a Governor who had publicly advocated the disbarment of Mr. Fieger as a means to curtail the activities of Dr. Kevorkian.

In 1996, Judge (now Justice) Corrigan initiated a filing that could have led to the disbarment of Plaintiff's counsel which Governor Engler had suggested the year before. Reacting to a statement critical of her by Mr. Fieger, Justice Corrigan filed, on government stationary, a Request for Investigation (Ex. C) (263a-268a).[8] That Request has since

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[8] In 1993, Governor Engler, who had appointed Judge Corrigan, publicly referred to another Judge as a "lunatic" who "I think he got his law degree from a mail-order school" [*Cain v. Dept. of Corrections*, 451 Mich. 470, 477, fn. 12; 548 N.W.2d 210 (1996)]. According to the Michigan Supreme Court decision, it was that Judge, not Judge Corrigan, who brought the Governor's statement to the attention of the Attorney Grievance Commission (451 Mich. at 477-478). That Commission had dismissed the Request involving Governor Engler more than two years before Judge Corrigan complained of Mr. Fieger (451 Mich. at 479).

Justice Corrigan later authored the Opinion for the Court in *In re Chmura*, 461 Mich. 517; 608 N.W.2d 31(2000). In *Chmura*, the Court recognized the First Amendment protections afforded public comments challenged as false or misleading (461 Mich. 529-544).

been dismissed by the Attorney Grievance Commission (Ex. D) (269a-271a).

In 1998, Mr. Fieger received the nomination of the Democratic Party to run for the gubernatorial office held by Governor Engler, who was re-nominated by the Republican Party. During this time (and for some time before) Lucille Taylor, the wife of Justice Taylor, served as counsel to Governor Engler.

The 1998 campaign featured acrimonious insults between Mr. Fieger and Governor Engler. When the dust settled, Governor Engler was re-elected by a wide margin. Mr. Fieger has never run for public office before or since the 1998 gubernatorial campaign.

This case of Linda Gilbert had been filed in 1994. It came for trial in the summer of 1999. At the trial, Ms. Gilbert was represented by Mr. Fieger. Neither the United States nor Michigan Chamber of Commerce participated, or sought to participate. After a lengthy trial, the jury returned a substantial verdict for Ms. Gilbert which received considerable media attention. On May 1, 2000, the trial court denied Respondent's post-trial motions. Shortly afterward, Respondent appealed of right to the Michigan Court of Appeals.

With this state of affairs, Justices Taylor, Markman and Young ran for re-election in 2000. The Michigan Chamber of Commerce, which was later granted leave to participate and filed an *Amicus Curiae* Brief on behalf of its member, Respondent Daimler Chrysler, reportedly provided over $3,000,000 in financial support to the candidacies of these Justices [National Law Journal, 10/28/02, p. A9 (Ex.

E)(274a)].[9] A successful "dancing tree" ad is credited to Mr. LaBlant, the Michigan Chamber's general counsel and the author of its *Amicus* Brief opposing Petitioner in the Michigan Supreme Court (*Id*). Among the ads for Justices Taylor, Markman and Young paid for by the Michigan Chamber was one which mentioned Mr. Fieger by name, and claimed that he was proud of an ad which, the Chamber claimed, mis-characterized rulings (Ex. F).

Mr. Fieger was not a candidate for office in 2000. Nonetheless, the Justices and their campaign supporters publicly implied and announced opposition to Mr. Fieger personally, depicting him as the enemy.

Justice Markman campaigned on the platform that he was personally an opponent of attorneys like Mr. Fieger who represented plaintiffs in medical malpractice cases.[10] In a public statement to a medical group (Ex. I)(277a-288a), Justice Markman referred to attorneys like Mr. Fieger ("the people who quite frankly make a livelihood by suing you") as

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[9] Part of the $3,000,000 was a Chamber of Commerce ad [audiotape, Ex. G; transcript, Ex. H (276a-277a)] which castigated Democratic candidate Judge Edward Thomas for accepting substantial contributions from attorneys. In its own words, the Chamber voiced the view that election of a Justice who accepts "special interest money" of significant magnitude from those "who could appear before him" would be "bad for Michigan".

[10] The fact that Mr. Fieger represents plaintiffs in malpractice cases has been a matter of public record long before the 2000 campaign. See *e.g. Palenkas v. Beaumont Hospital*, 432 Mich. 527; 443 N.W.2d 354 (1989).

the opponents himself and his fellow Republican nominees ("our opponents").

Justice Young was even more unabashed about characterizing the relationship with Mr. Fieger as one which he regards as hateful, "Geoffrey Fieger and his trial lawyer cohorts hate this court" (Ex. J) (289a).[11] Nor does Justice Young regret the relationship he believes to be grounded in hate. On the contrary, his avowed position is that, "There's honor in that" (*Id*).

Justice Taylor also personalized the campaign, referring to this case and others in which Mr. Fieger had obtained substantial verdicts for his clients. It is reported (Ex. K)(290a) that Justice Taylor, at a fund-raiser, noted, "Geoffrey Fieger currently has $90 million of lawsuit awards pending in the State Court of Appeals."

The three Justices also attacked Mr. Fieger personally in a radio advertisement (audio tape, Ex. L; transcript, Ex. M)(290a-291a) in which they implied that Petitioner's counsel supported the opposing candidates because of Mr. Fieger's attraction to vicious, false, degrading attacks on them. They characterized the ads of the Democratic nominees as "vicious", "false", "seedy", a "smear campaign" and "degrading the Court and the public confidence in Michigan's judiciary", then insinuated that Mr. Fieger (who had nothing

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[11] There is some ambiguity in Justice Young's reference to "this court". In context, he seemingly did not believe that Petitioner's counsel hated the Supreme Court as an institution, but instead believed that the hate was directed at the Justices as individuals, particularly the members who comprised the Republican majority.

to do with the ads in issue) supported their opponents for that very reason, "Some people will do anything to get elected. No wonder Geoffrey Fieger, Jesse Jackson [and others support the Democratic candidates]". The voices of Justices Young, Markman and Taylor themselves can be heard at the end of that advertisement.

Another instance of the "anti-Fieger" tone of the 2000 campaign of Justices Young, Markman and Taylor is the "He's back . . ." flyer distributed on behalf of these Justices (Ex. N) (293a-294a). The campaign literature features Mr. Fieger's face, characterizes the opposing candidates as "FIEGER's FRIENDS" and "the Fieger team", and asserts that, "Geoffrey Fieger [and others are] trying to take over Michigan's Supreme Court".

Another piece of campaign literature distributed on behalf of Justices Taylor, Markman and Young was entitled, "Our police make critical judgements each day" (Ex. O) (294a-297a). That literature criticized the opposing candidates as "Geoffrey Fieger's friends."

Yet another piece of literature (Ex. P) (297a-300a) characterized Judge Fitzgerald (who Mr. Fieger had stridently criticized over the *Hobbins* decision), the Democratic candidate, as a "Geoffrey Fieger libera[l]." The literature was entitled, "Forever isn't long enough for a child molester", implying that Mr. Fieger supported the sexual abuse of children.

A significant feature of the 2000 campaign for Justices Young, Taylor and Markman was to depict Mr. Fieger as a person who had acquired wealth by bringing lawsuits that were without substantive merit. In addition to Justice

Markman's ("people who . . . make a livelihood by suing you") reference and the ("Geoffrey Fieger . . . $90 million of lawsuit awards") comment of Justice Taylor, a March 3, 2000 press release criticizing Ms. Robinson (a Democratic nominee) identified her as favored by "a multi-millionaire trial lawyer" who, if elected, would allow "trial lawyers like Geoff Fieger [to] keep getting richer while Michigan families keep footing the bill" (Ex. Q) (301a). The "Victory Line" publication (Ex. R)(302a-306a), which promoted the candidacy of Justices Young, Taylor and Markman, attacked Petitioner's counsel by name and accused Mr. Fieger of using "specious legal reasons" to foster litigation which was primarily without merit ("most of which is frivolous, excessive and very expensive for taxpayers").

These campaign statements have sparked comment in the legal media by the former President of the State Bar of Michigan (Ex. S) (307a-312a). They have also been the subject of comment in the popular media (Ex. T) (313a-316a).

The statements discussed above by and on behalf of Justices Young, Markman and Taylor accomplished their goal. All three were elected in 2000.

On July 30, 2002, the Michigan Court of Appeals affirmed the Judgment for Ms. Gilbert in this action. On September 12, 2002, the Court denied Daimler Chrysler's Motion for Rehearing. The Michigan Chamber of Commerce did not participate in Court of Appeals proceedings.

Respondent Daimler Chrysler filed its Application for Leave to Appeal. As Exhibits to its Application, which castigated Mr. Fieger and characterized the case as substantively meritless, Respondent provided a newspaper

article regarding Mr. Fieger's 1998 gubernatorial campaign (Ex. J to Application) and a political website critical of Governor Engler (Ex. K to Application).

In the fall of 2002, the United States and Michigan Chambers of Commerce entered the case when it reached the Michigan Supreme Court. Both asked the Court to rule in favor of their member, Daimler Chrysler.

At about the same time, Justice Young was running for re-election. The Michigan Chamber of Commerce financed a television campaign endorsing Justice Young (Ex. U). On April 8, 2003, the Court issued an Order granting what the Michigan Chamber of Commerce requested: leave to participate as *Amicus Curiae*, and leave to appeal to its member, Defendant Daimler Chrysler.

Recusal Proceedings In The State Court

Once the case was before the Michigan Supreme Court, Petitioner filed her Motion for Recusal and for Evidentiary Hearing,[12] presenting the constitutional questions now featured in this Petition. Together with the Exhibit materials discussed above, Petitioner filed the Affidavit of Mr. Fieger (215a-224a).

The recusal motion was denied without explanation and without an evidentiary hearing. *Gilbert v. Daimler Chrysler*

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[12] The initial Motion also sought the recusal of Justice Weaver, the recipient of Chamber of Commerce support in the 2002 election. When Justice Weaver explained her decision (unlike the others in issue), Petitioner did not seek rehearing as to her.

Corp., 469 Mich. 883; 669 N.W.2d 265 (2003). Justice Weaver explained why she did not think that her recusal was required (*Id.*). Petitioner sought rehearing as to Justices Young, Markman, Taylor and Corrigan, and that Motion was likewise denied without comment or opinion except by Justice Weaver. *Gilbert v. Daimler Chrysler Corp.*, 469 Mich 889; 670 N.W.2d 560 (2003).

Related Federal Proceedings

While the recusal motion was pending before the Michigan Supreme Court, Petitioner and Fieger filed suit in the United States District Court for the Eastern District of Michigan (*Gilbert, et. al. v. Ferry, et al*, No. 03-60185). In essence, invoking their Fourteenth Amendment rights, they sought declaratory and injunctive relief on the basis that their cases would not be impartially heard by Michigan Supreme Court Justices Markman, Taylor, Young or Corrigan because of their bias toward Fieger and his clients. Ultimately, the federal district court judge declined to provide a federal forum (319a-341a), and the Sixth Circuit Court of Appeals has recently affirmed ___ F.3d ___ (6th Cir. 2005) (342a-354a).

The Michigan Supreme Court Decision

By Opinion and denial of rehearing, Justices Young, Taylor, Markman and Corrigan, the very Justices whose recusal was sought, voted to provide Respondent with a new trial. Except for those four, no other Judge, Justice or juror would provide that relief to Respondent. Since the four comprised a majority of the seven Justice Michigan Supreme Court, the verdict for Petitioner was abrogated.

These facts frame the central issue presented. Petitioner submits that the Court should consider whether the Due Process Clause of the Fourteenth Amendment is offended by State procedures by which her fate is relegated to decision-makers with an intense pronounced public dislike for her counsel, and who are the recipients of a $3,000,000 campaign benefit from an Amicus favoring its member, Petitioner's litigation adversary.

THE REASONS WHY CERTIORARI SHOULD BE GRANTED

1. Overview

It is commonly said that ours is a system of law, not of men or women. That ideal reflects the profound truth that the most fundamental feature of American justice is that it is administered by those having no interest, or apparent interest, in the outcome. *Talbert v. Muskegon Construction Co*, 305 Mich. 345, 348; 9 N.W.2d 572 (1943).[13]

An impartial judiciary is of obvious importance to the litigants and attorneys whose cases are adjudicated. This interest is recognized by the core precept of constitutional law that the Due Process Clause guarantees an impartial decision-maker. *People v. Lowenstein*, 118 Mich. App. 475, 482-483; 325 N.W.2d 462 (1982) ("The right to a fair tribunal is a

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[13] "One of the fundamental rights of a litigant under our judicial system is that he shall be entitled to a hearing before a court to which no taint of prejudice is attached. This is so firmly established as to regularly constituted courts as to need no comment."

right grounded in due process"). This Court's decisions have repeatedly embraced that truism. See *e.g. Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Ward v. Monroeville*, 408 U.S. 57 (1972); *Johnson v. Mississippi*, 463 U.S. 212 (1971).

This case is truly extraordinary. While electoral politics inevitably result in campaign contributions, the sheer amount paid by the Chamber of Commerce for these Justices who favored their member, Daimler Chrysler, is eye-popping. If $3,000,000 in payments is not cause for recusal, one may wonder whether justice is truly for sale in America.

Similarly, the degree of animosity publicly directed at Petitioner's counsel by the Justices who decided Petitioner's case is seemingly unprecedented. If a Justice who revels in a relationship of hatred toward counsel is deemed "impartial", or if a Justice who seeks to have counsel disbarred is "unbiased", then the constitutional guarantee is rendered hollow indeed.

Without certiorari review, the ability of State Supreme Court Justices to vent their political spleens is literally unbridled and unreviewed. There are no other State Court Judges to provide review. The federal courts will not entertain a suit to vindicate federal rights (319a-341a, 342a-354a), essentially on the ground that review should be sought by certiorari. Absent review by this Court, there is no forum at all to protect the important Constitutional right here at stake.

In short, this case presents timely and extraordinarily important questions that strike to the heart of American justice

and public confidence in the judiciary. Those questions warrant certiorari.

2. The Question Whether The Due Process Clause Permits Decision By One Who Has Obtained A Multi-Million Dollar Campaign Benefit From A Participating Amicus, Whose Member Is A Litigant, Is A Substantial Issue

While many issues of recusal are purely matters of state law, the Due Process Clause at least provides protection in extreme cases. See *e.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820-822 (1986). Here, the participation of Justices who have received such largesse from an interested party or its Amicus organization is so out of line with norms of propriety as to raise a significant constitutional issue.

In JI-65 (2/25/93), the State Bar of Michigan Standing Committee on Professional and Judicial Ethics recognized the recusal implications of undue involvement with a Chamber of Commerce. Concluding that a judge could not properly participate in a Chamber political action committee, the Committee noted:

> "The judge . . . would incur the appearance of being pre-disposed in favor of pro-business interests or members of the Chamber of Commerce and would face recusal in legal proceeding involving such interests."

More remarkable still is the astounding size of the Chamber payment. JI-2 (1/28/89) notes with approval an article discussing the implications of an extraordinarily large contribution from a single source:

> "In Terrance J. Brook's article, *Campaigning for Judicial Office: An Overview of the Ethical Constraints,* he points out a New York ethics opinion (Opinion No. 289, 1973), which states that a judicial campaign committee should not accept an amount from a single source, other than the candidate or his/her family, which is so large as to foster an appearance that the donor is seeking favored treatment. The contribution of a large sum might be misinterpreted as improperly intended, even if that is not the case, and although there is nothing unethical in a contribution of that size in and of itself. Implicit in such a contribution is the possibility that the donor is hoping to improve his or her or its reception in the courtroom."

Judges and commentators have grappled with the tension between the need for campaign contributions and the need to assure the public that judicial rulings are not for sale. In general, the prevailing view is that campaign contributions are relevant to the disqualification calculus, do not necessarily lead to recusal, but may require recusal where the amount is extraordinary. See *Ex Parte Bryant*, 675 So.2d 552 (Ala. Crim. App. 1996) (under Alabama law, "a campaign contribution to a circuit judge in excess of $2,000 will presumptively bias a circuit judge in the mind of the public"); *In re Mississippi Code of Judicial Conduct*, Canon 3 (E)(2) (that an attorney is a "major donor" is a recognized basis for a disqualification motion, but disqualification is not automatic); *City of Las Vegas Downtown Development Agency v. Eighth Judicial District Court*, 116 Nev. 640; 5 P.3d 1059 (2000) (campaign contributions of $2,000 or less are not so large as to require disqualification); *Pierce v. Pierce*, 39 P.3d 791 (Alabama, 2000) (campaign contributions by counsel and

his father of $10,000, coupled with campaign efforts for the judge, make recusal appropriate); *Reems v. St. Joseph Hospital*, 536 N.W.2d 666 (N. Dak. 1995) [commentary to North Dakota Canon 5(C)(2), "Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3, E"].

A similar, but less compelling, case for recusal arose in *Rogers v. Bradley*, 909 S.W.2d 872 (Tex. 1995), where the political action committee of the Texas Medical Association had produced a video, sympathetic to the plight of Dr. Bradley, which endorsed Supreme Court candidates. Even though the PAC did not participate in Supreme Court proceedings (in contrast to the Chamber's direct participation in this case), one of the Justices endorsed by the PAC (Justice Gammage) recused himself, while another (Justice Enoch) declined to do so. Justice Gammage explained:

> "I believe that (1) where a person or entity has sought to engender support, financial or otherwise, for a judicial candidate or group of candidates, and (2) where that effort is made through a medium which is intended to be widely circulated, and (3) where that effort ties the success of the person's or entity's chosen candidate or candidates to the probable result in a pending or impending case, a judge should recuse from participating in that case under Rule 18b (2)(a). The rule does not require that the judge must have engaged in any biased or prejudicial conduct. It does require the judge to recuse if 'his impartiality might reasonably be questioned,' regardless of the source or circumstances giving rise to the question of impartiality and even though the source and

> circumstances may be beyond the judge's volition or control.
>
> Because I believe a reasonable member of the public at large, knowing all of the facts in public domain, would doubt that the justices portrayed favorably in the TEX-PAC video are actually impartial I recuse myself from participation in all matters related to this cause."

Here, the economic benefit to the campaigns of Justices Taylor, Young, and Markman from the Michigan Chamber of Commerce vastly exceeds the amount of any other contribution. The payments were made in the context of a campaign which urged voters to elect Justices Markman, Young and Taylor to oppose Mr. Fieger personally.

On the most benign level, those aspiring to be Supreme Court Justices necessarily have a strong desire to attain that office -- the campaign rigors and unkind criticisms they undergo attest to that desire. Just as obviously, it is the most basic human nature to be profoundly grateful to, and wish to reciprocate the kindness of, an interested party whose massive payments have enabled a Justice to attain his or her seat. These fundamental human emotions cannot help but cause the Justices in issue to look more favorably on a position advocated by a seven-figure benefactor then one advocated by a stranger.

The appearance of impropriety is borne out by the outcome. Not a single judge involved in the case, other than those whose recusal was sought, has ever opined that Respondent should receive a new trial. The participation of Justices who received campaign benefits from the Chamber

sends the unmistakable message that multi-million dollar campaign contributions will be rewarded by the decisions of Justices who benefit from them. It is grossly unseemly for Justices Young, Taylor and Markman to rule as requested by the Chamber, which had no interest in the case until it reached the Supreme Court, after accepting the benefit of a multi-million dollar political advertising campaign which the Chamber waged publicly.

In brief, the Constitutional issue is substantial. It should be reviewed by this Court.

3. The Question Whether Due Process Guarantees Are Offended By The Participation Of State Justices Who Have Publicly Vilified Petitioner's Counsel, And Have Founded Their Campaigns For Office On Criticisms Of Petitioner's Counsel, Is A Substantial One

This case involves far more than the inevitable difference in political views that may arise when a litigant is represented by counsel of a political party different than that of a Governor who appointed Judges or Justices. Rather, it involves intense, regrettably personal, enmity. While the mutual disrespect between Governor Engler and Mr. Fieger does not inherently require the recusal of Judges or Justices appointed by the former Governor, it does provide the backdrop to animosity that far transcends simple, and civil, political disagreements.

The clash goes back at least 10 years when the debate over physician-assisted suicide became personalized by Governor Engler's advocacy of Mr. Fieger's disbarment as a means of preventing Dr. Kevorkian from activities deemed

objectionable. The two were direct adversaries in a gubernatorial campaign that featured mean-spirited comments far surpassing mere political disagreement.

Under any circumstances, a fair-minded person who owes his or her judgeship to Governor Engler would be hard-pressed to entirely set aside hostility when judging a case brought by Mr. Fieger whose enmity with Governor Engler has been so public and virulent. These are not the best of circumstances, where the appointee has remained aloof from the fray. Rather, in numerous respects, Justices Taylor, Markman, Corrigan and Young have been personally drawn into the controversy, expressing their own aversion or hostility toward Ms. Gilbert's attorney. Neither justice nor its appearance is served by resigning Petitioner's fate to decision-makers who harbor that attitude toward her attorney.

Justice Young has publicly proclaimed his belief that Petitioner's counsel, Mr. Fieger, hates him. He has expressed the "honor" he finds in a relationship characterized by hate. Feelings toward Petitioner's counsel as overwhelming as "hate" (a word that similarly characterizes Osama Bin Laden's attitude about America, or the Ku Klux Klan's view of interracial dating, or the Saddam Hussein-President Bush relationship) make it inappropriate for Justice Young to sit in judgment of this case under the Fourteenth Amendment standard.

Justice Frankfurter has observed, "Where there is ground for believing that . . . unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves . . ." *Public Utilities Commission of D.C. v. Pollak*, 343 U.S. 451, 466; 72 S. Ct. 813; 96 L.Ed. 1068 (1952). Surely Petitioner can

only believe "not unfairly" that she cannot receive the totally impartial consideration of a Justice who regards his relationship with her attorney as hateful.

As noted in *McCullough v Davis*, 147 P 779 (Okla, 1915):

> "The framers of our Constitution guarded with special care our judiciary and tried to place it above suspicion of unfairness, passion, or prejudice, so that public confidence in our courts would not be shaken, and provided that right and justice should be administered without prejudice. By virtue of this constitutional provision, who can doubt or question the absolute and unqualified right of the citizen, when called to answer in a court of justice, to demand that his trial shall be before an impartial judge and by impartial jurors? Any other doctrine would place the rights of the citizen which were intended to be protected by this constitutional provision at the mercy or control of the court or judge thereof."

Perhaps even more troubling is that Justice Young has no regret about that perceived animosity. Instead of lamenting the perceived hatred, he seemingly delights in it, believing it an "honor" to be hated. The unmistakable implication is that Justice Young is delighted to reciprocate, publicly no less, the hate which he believes is directed toward him by Mr. Fieger.

The potency of the emotion "hate" was discussed in *Loyd v. Georgia*, 45 Ga. 57 (1872):

> "Hatred is another one of the bad passions that spring from the corruption of the heart. It is condemned by that great moral law which Infinite

> Wisdom has prescribed for the conduct of man. To hate our neighbor is a crime and a vice against the moral law. But men will hate one another, and in order to justify this basest of passions of the heart, will concoct and carry out schemes of mischief that result in death, and that bring sorrow and grief into innocent households."

In other cases, the challenged judge regarded counsel as a party with animosity that was not expressed in terms as strong as "hate". Even so, recusal has been deemed appropriate where a clear animosity between the judge and counsel exists. See *e.g. Town Centre of Islamorada, Inc v. Overby*, 592 So.2d 774 (Fla. App. 1992); *Tower Group, Inc v. Doral Enterprises*, 760 So.2d 256 (Fla. App. 2000) (counsel was judge's opponent in an acrimonious campaign); *Kentucky Journal Publishing Co v. Gaines*, 139 Ky. 747; 110 S.W. 268 (1908) (political enmity and publicly announced position required recusal); *Ponder v. Davis*, 233 N.C. 699; 65 S.E.2d 356 (1951) (political activities adverse to the movant).

In *Stephen v. Natchez*, 261 So.2d 486, 489 (Miss. 1972), the trial judge expressed his belief that there was a "lot of political motivation, revenge and hate in connection with this lawsuit". The imputation of hate was one of several factors leading to the conclusion that the judge should have recused himself.

The existence of inter-personal animosity, or collateral litigation, between a judge and counsel has been frequently regarded as calling upon a judge to refrain from judging a case of his or her adversary. Indeed, a judge who is "enmeshed in other matters" involving the movant may be regarded as constitutionally disqualified for that reason.

Johnson v. Mississippi, 403 U.S. 212, 215; 91 S. Ct. 1778; 29 L.Ed.2d 423, 427 (1971); *Crampton v. Dept. of State*, 395 Mich. 347, 351; 235 N.W.2d 352 (1975).

In 1993, Governor Engler had publicly suggested the disbarment of Mr. Fieger as a means of ending the activities of Dr. Kevorkian. Chief Justice Corrigan's husband was an outspoken critic of Dr. Kevorkian's activities. After having been appointed by Governor Engler, Chief Justice Corrigan made the filing which could have resulted in the very outcome, disbarment of Mr. Fieger, that her sponsor had publicly discussed. The inevitable appearance of these events is one of personal animosity to Mr. Fieger arising from the spirited conflict which pitted Mr. Fieger and Dr. Kevorkian against Governor Engler, Chief Justice Corrigan, and her husband.

Even without the context provided by Governor Engler's call for disbarment, the filing of a Request of Investigation is inherently personal in nature. Such a filing jeopardizes the attorney's ability to represent clients, pursue a chosen career, or earn a livelihood. Feelings so intense that they motivate a judge to attempt to destroy an attorney's career undermine the right to an impartial decision-maker.

It is also significant that the Request against Mr. Fieger has been dismissed (Ex. D). If it had been sustained, one might at least plausibly contend that a client whose attorney has been professionally disciplined cannot complain about a meritorious grievance filing. Here, however, no such contention can be made.

In 2000, Mr. Fieger was not a candidate for political office. Nonetheless, the campaign advertisements of Justices

Markman, Young and Taylor cast Plaintiff's counsel as their opponent. This campaign approach raises two distinct bases for recusal: the expression of personalized opposition to Mr. Fieger, and the implicit public campaign promise that, if elected, they will oppose Mr. Fieger's perceived interests.

On behalf of Justices Markman, Young and Taylor, it has been publicly claimed that Mr. Fieger was "trying to take over the Supreme Court", and that the opposing candidates were "Fieger's Friends", or the "Fieger team". The apparent implication is that Petitioner's counsel and these Justices were personally at odds, a theme echoed by the "hate" and "opponent" comments of Justices Young and Markman (Exs. I, J).

The antipathy toward Petitioner's counsel in those public statements is more explicit in the literature which characterizes Judge Fitzgerald as a "Geoffrey Fieger libera[l]" while proclaiming "Forever isn't long enough for a child molester" (Ex. P). The totally false implication that Mr. Fieger is favorably disposed toward child molesters underscores the depth of the bias and prejudice harbored toward Mr. Fieger.

In fairness, it may be noted that these "anti-Fieger" statements were made by the party that nominated the Justices rather than the Justices themselves. Petitioner does not know what role, if any, the Justices personally played in the public criticisms of Mr. Fieger on their behalf. If personal participation by the Justices is deemed significant, that is yet another appropriate subject for the evidentiary hearing which Petitioner unsuccessfully sought.

What is known is that the Justices themselves have personally participated in making Petitioner's counsel a target in the 2000 campaign. The voices of Justices Young, Markman and Taylor appear on the advertisement which mentions Mr. Fieger by name and implies that the reason ("No wonder Geoffrey Fieger") Petitioner's counsel supports their opponents is that they resorted to a "vicious" "false", "silly", "smear campaign" "degrading the Court and the public's confidence in Michigan's judiciary". The professed belief of Justices Young, Markman and Taylor that Petitioner's counsel relishes vicious, false efforts to degrade the Court and erode public confidence, on the basis of a campaign ad by the Democratic candidates that Mr. Fieger had nothing to do with, conveys the disrepute in which Petitioner's counsel is held by these Justices, a disrepute that may be regarded as "bias" or "prejudice" in the absence of any involvement by Mr. Fieger in the Democratic ad that spawned the comments found in Ex. L.

In *State v. Garner*, 760 S.W.2d 893, 906 (Mo. App. 1988), the court recognized how prior adverse statements are inconsistent with the impartiality that is required:

> "Conduct or speech of a trial judge indicative of a belief as to the accused's guilt is the antithesis of impartiality. Acts or conduct [that] give the appearance of partiality should be avoided with the same degree of zeal as acts or conduct [that] inexorably bespeak partiality."

CONCLUSION

In sum, the public denouncement of Petitioner's counsel by Justices Taylor, Young, Markman and Corrigan bespeaks a partiality that is at odds with Fourteenth Amendment guarantees. Certiorari should be granted.

Respectfully submitted,

FIEGER, FIEGER, KENNEY & JOHNSON

By: GEOFFREY N. FIEGER (P30441)
TAMMY J. REISS (P41851)
Attorneys for Petitioner
19390 West Ten Mile Road
Southfield, Michigan 48075
(248) 355-5555

BENDURE & THOMAS

MARK R. BENDURE (P23490)
Counsel of Record
645 Griswold, Suite 4100
Detroit, Michigan 48226
(313) 961-1525

Dated: May 26, 2005

APPENDIX A

SUPREME COURT OF MICHIGAN

No. 122457

[Decided January 28, 2005]

LINDA M. GLIBERT,
Plaintiff-Appellee,

v.

DAIMLERCHRYSLER CORPORATION,
Defendant-Appellant.

JUDGES: Clifford W. Taylor, Chief Justice, Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Maura D. Corrigan, Robert P. Young, Jr. Stephen J. Markman, Justices. Cavanagh and Kelly, JJ., would grant rehearing for the reasons stated in the dissenting opinion by Cavanagh, J. Weaver, J., dissenting.

OPINION

Order

In this cause, a motion for rehearing is considered, and it is DENIED.

Cavanagh and Kelly, JJ., would grant rehearing for the reasons stated in the dissenting opinion by Cavanagh, J.

DISSENTBY: Weaver

DISSENT:

Weaver, J. (dissenting)

I dissent from the decision of the four-justice majority (Chief Justice Taylor and Justices Corrigan, Young, and Markman) to deny plaintiff's motion for rehearing. After six weeks of testimony and argument, a jury found defendant, DaimlerChrysler Corporation, liable for several years of sexual harassment suffered at work by plaintiff, Linda Gilbert. Tragically, four months after the four majority justices reversed the jury verdict, plaintiff, Linda Gilbert, died at age 45 of a heart attack.

I would grant plaintiff's motion for rehearing, vacate the majority's reversal of a jury verdict in this exceedingly strong case of sexual harassment, and remand for remittitur.

APPENDIX B

SUPREME COURT OF MICHIGAN

No. 122457

[Filed July 22, 2004]

LINDA M. GLIBERT,
Plaintiff-Appellee,

v.

DAIMLERCHRYSLER CORPORATION,
Defendant-Appellant.

BEFORE THE ENTIRE BENCH. Chief Justice: Maura D. Corrigan, Justices: Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. CAVANAGH, J. (dissenting).

ROBERT P. YOUNG, JR.

OPINION

In this appeal, defendant seeks reversal or remittitur of the largest recorded compensatory award for a single-plaintiff sexual harassment suit in the history of the United States. The $21 million verdict awarded, according to plaintiff, barely

compensates her for the lasting effects of the sexual harassment she endured as an employee of defendant, DaimlerChrysler, by whom she is still employed and earning almost $100,000 a year. She contended during her trial that defendant's failure to deal adequately with sexual harassment in her plant led to a permanent change in her "brain chemistry" and a relapse into substance abuse and depression, and that these conditions will soon lead to her untimely and excruciating death.

The foundation for this theory of recovery was laid by the expert opinion testimony of a social worker who had a longstanding relationship with plaintiff's counsel. This witness not only lacked any training, education, or experience in medicine, but also testified falsely about his credentials. Nevertheless, plaintiff asked the jury to treat this witness's testimony as a "prognosis," and to compensate plaintiff for the loss of her health and, eventually, her life. Plaintiff's counsel evoked images of physical abuse and torture, compared his client to survivors of the Holocaust, and argued that defendant DaimlerChrysler thought of itself as "God Almighty," exempt from the legal norms that govern others. Thus, in defendant's view, the verdict was the product of inflammatory rhetoric, unscientific "expert" testimony, fraud on the court, and attorney misconduct.

We granted leave to appeal in order to determine whether the verdict was a legitimate estimate of plaintiff's losses, as plaintiff contends, or whether it was, as defendant argues, an unjust, excessive award procured through systematic misconduct by plaintiff's trial counsel and supported by dubious evidence. The majority and the dissent agree on one

fundamental fact: the verdict rendered in this case is excessive and cannot be affirmed.[1]

A careful review of the record reveals that plaintiff's trial counsel engaged in a sustained and deliberate effort to divert the jury's attention from the facts and the law. In their stead, counsel interposed misleading argument, prejudice-baiting rhetoric, and pleas for punitive damages. This rhetoric had its

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[1] We differ not, as the dissent suggests, because we believe that the plaintiff has failed to make out a case of sexual harassment worthy of *a* verdict. We differ instead because we believe that *this* verdict is excessive and because we have concluded that the record supporting this verdict is the result of plaintiff's counsel's repeated invitation to the jury to exercise its collective prejudices in preference to fairly compensating plaintiff on the evidence presented. For all of the reasons detailed in this majority opinion, we conclude that the repeated, explicit and inappropriate references to the Holocaust, defendant's German national origin, and defendant's status as a corporation cannot be tolerated in Michigan courts any more than in our society at large.

The people have declared in our Constitution that "equal protection of the laws" shall not be denied on the basis of national origin. Const 1963, art 1, § 2. *See, also*, the Michigan Civil Rights Act, MCL 37.2101 *et seq*. The observance of this fundamental principle cannot stop at the door of the courthouse. Indeed, it is within the courthouse that we ought be most concerned that the merits of a party's cause, not its alienage or status, should remain the exclusive focus of a jury's deliberations. Thus, while we hold no brief for the inadequacies of defendant's counsel that the dissent has taken pains to note, defendant was entitled to a trial free of naked appeals to entice the jury to consider its passions and prejudice rather than the evidence.

intended result: the jury's verdict unmistakably reflects passion rather than reason and prejudice rather than impartiality.

We conclude that the trial court lacked any justification for denying defendant's postverdict motion for a new trial under MCR 2.611. Thus, the trial court abused its discretion in denying defendant's motion for a new trial. We reverse, and we remand to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

It is undisputed that plaintiff, Linda Gilbert, has long waged a losing battle with substance abuse. Her personal struggles were thoroughly documented in medical records that plaintiff introduced at trial in order to establish damages. According to those records, Ms. Gilbert began drinking at fourteen and began using cocaine at twenty years of age. Most of her adult life has since been marked by excessive drinking. At one point during her employment with defendant, she reported to her substance abuse counselors that she was consuming a pint to one-fifth gallon of alcohol a day. Her cocaine use also continued during her employment with defendant, as documented by records from St. John Hospital and Sacred Heart Rehabilitation Center.

Ms. Gilbert sought professional assistance on a number of occasions and has been treated on both an inpatient and outpatient basis for substance abuse. On the basis of the testimony at trial, however, it appears that none of these treatments has been entirely successful. Indeed, the foundation of plaintiff's claim for $140 million in damages

was the assertion that plaintiff's substance abuse would continue until it resulted in her death.

Plaintiff's work life contrasts markedly with her personal difficulties. In the mid-eighties, plaintiff began an apprenticeship to train for a career as a millwright. By 1990, plaintiff had become a journeyman millwright and was hired two years later by the Chrysler Corporation.[2] Plaintiff was the first female millwright to work at Chrysler's Jefferson North Assembly Plant in Detroit. To our knowledge, plaintiff continues to work for defendant and, according to her attorney, earns "nearly $100,000 per year" with overtime pay.

Plaintiff initiated the present sexual harassment action against defendant on March 25, 1994, complaining that a hostile work environment existed in defendant's Jefferson North plant. At that time, plaintiff had reported two specific instances of harassment through defendant's formal discrimination reporting procedure. The first incident took place on May 22, 1993, a little over a year after plaintiff began working for defendant. Plaintiff reported that she found a lewd cartoon taped to her toolbox. It depicted a woman in a bar engaged in an "arm-wrestling" match with a man's penis. Plaintiff's name was written above the woman in the

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[2] Chrysler was a corporate predecessor of defendant DaimlerChrysler. In 1998, Chrysler merged with Daimler Benz AG to form DaimlerChrysler. DaimlerChrysler is the named defendant in this action.

cartoon, and the name of a coworker was written on the man whose penis was being wrestled.[3]

After receiving plaintiff's oral report of this cartoon, plaintiff's supervisor and area coordinator apologized to plaintiff, stated that defendant "did not condone such action" and that they would address the problem by speaking with employees in the area and distributing copies of defendant's written policy against sexual harassment. Defendant's internal memo notes that an employee in Chrysler's human resources department and several other employees spoke with the workers in plaintiff's area and distributed the company's sexual harassment guidelines following plaintiff's report.

The second reported incident took place on June 5, 1993, when plaintiff found a Polaroid photograph of a penis on her toolbox. She informed her supervisor about the picture. Defendant's internal memo concerning the complaint indicates that its supervisory employees apologized to plaintiff and reassured her that "[Chrysler did] not approve of such action, and that [Chrysler was] doing everything possible to prevent such harassment."

On the basis of these two incidents, plaintiff initiated a lawsuit against defendant alleging breach of contract, violations of the Michigan Civil Rights Act, MCL 37.2101 *et*

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[3] When plaintiff described the cartoon in a written report requested by defendant, she wrote that "the woman was bare-breasted and about to perform fellatio. I was named as the woman. I was extremely insulted and degraded. The insinuation that this happens between myself and a man I work with everyday is humiliating."

seq., and negligence in addressing plaintiff's concerns about sexual harassment in the workplace.[4]

After filing her lawsuit, plaintiff formally reported to management several other incidents of harassment that occurred while the suit was pending. Plaintiff reported that, on October 10, 1994, she found a vulgar cartoon entitled "Highway Signs You Should Know" taped to her locker;[5] she also reported that she had found an article by "Dr. Ruth" taped to her locker one week earlier.[6] In response, Maya Baker, a human resources facilitator for defendant, personally patrolled plaintiff's work area on occasion and also asked union leaders to share with union members that the responsible party could be terminated. Next, plaintiff reported that on March 12, 1995, she found a lewd and misogynistic "poem" on a bulletin board in a work area adjacent to hers.[7] Defendant investigated these latter two incidents and, being unable to determine the responsible party, removed the bulletin board.

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[4] The breach of contract and negligence claims were omitted from the pretrial order and were not presented to the jury.

[5] The cartoon contains a number of lewd drawings, each apparently meant sexually to illustrate "highway signs" such as "Dead End" and "Men at Work."

[6] The article by columnist Dr. Ruth Westheimer was a response to a man complaining that his penis was sore from having sexual intercourse too frequently.

[7] The "poem" is reproduced in the Court of Appeals' opinion. Unpublished opinion per curiam, issued 2002 Mich. App. LEXIS 1168, July 30, 2002 (Docket No. 227392), pp 6-7.

Finally, on September 2, 1997, plaintiff formally reported that a coworker made references to his "big meat" in front of her. In response to plaintiff's complaint about her coworker's apparent reference to his genitals, defendant reprimanded the responsible employee.

These are the only sexual harassment incidents that plaintiff made known to defendant through the formal procedures established by defendant for such matters. However, plaintiff contends that defendant had actual notice of other incidents because of her description of those incidents during her deposition testimony given after the commencement of this suit and that defendant had "constructive notice" of other incidents.[8]

Before trial, defendant moved to exclude "evidence regarding incidents that were never reported." After hearing argument on this motion, the court denied defendant's request and admitted testimony and evidence on these unreported incidents.

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[8] Plaintiff testified, for example, that on her first day of work a coworker mentioned that he would like to hold a ladder for plaintiff if she were wearing a dress; that a coworker called her a "bitch" during a card game; that her toolbox was "blocked" when coworkers intentionally placed other equipment in front of it; that some coworkers ignored her or made false claims in order to get her in trouble with management; that a misogynistic cartoon was taped to her toolbox with the word "bitch" written on the tape; that a *Penthouse* article called "Why Men Have So Many Sperm" was set on a table next to her beverage; and that a liquid--which plaintiff now asserts was urine--was found on her chair.

At trial, plaintiff offered the testimony of social worker Carol Katz and of certified social worker and substance abuse counselor Steven Hnat. Mr. Hnat had counseled plaintiff regarding her substance abuse problems before the initiation of her lawsuit against DaimlerChrysler. He therefore testified as both a fact witness and an expert witness. His testimony proved to be the linchpin of plaintiff's case.

Mr. Hnat opined that the harassment experienced by plaintiff had caused irreversible changes in her brain chemistry, causing her to relapse into alcoholism and to develop "major depressive disorder." He testified that he had reviewed medical records prepared by other health professionals and, in his opinion, those records read "like a preview of [plaintiff's] death certificate." He further opined that plaintiff's body was beginning to "decompensate," and that she was "clearly dying." Mr. Hnat's theory was that plaintiff would develop a fatal case of pancreatitis, a disease that Mr. Hnat testified was "the most painful way to die." In the end, he told the jury that plaintiff was likely to die relatively soon because of "medical complications," and that he "wouldn't bet on her living very long."

Thus, plaintiff's theory of the case, as introduced through Mr. Hnat, was that the sexual harassment plaintiff encountered at Chrysler caused a permanent change in her brain chemistry that produced a relapse into alcohol abuse and the onset of depression. These conditions, in turn, would lead inexorably to plaintiff's untimely and excruciating death.

After a six-week trial and 1-1/2 days of deliberation, the jury returned a verdict of $21 million in favor of plaintiff. With prejudgment interest, a judgment for more than $30 million was entered for plaintiff.

On October 29, 1999, defendant moved for judgment notwithstanding the verdict (JNOV), a new trial, remittitur, an evidentiary hearing, and relief from judgment. The motion argued, among other things, that plaintiff's counsel and Mr. Hnat had perpetrated fraud on the court through misrepresentations about Mr. Hnat's relationship with plaintiff's counsel and about his academic credentials. Mr. Hnat testified at trial that he received a master's degree in "psychobiology" from the University of Michigan, and that, as an undergraduate, he won the prestigious Pillsbury Prize in psychology. These claims were duplicated on a version of Mr. Hnat's resume that was introduced as a trial exhibit. In fact, both statements were shown after trial to be false. Nevertheless, the trial court denied defendant's motions on May 1, 2000. The Court of Appeals affirmed the jury's verdict in an unpublished opinion.

On April 8, 2003, we granted defendant's motion for leave to appeal.[9]

On appeal to this Court, defendant asserts four major claims of error. First, DaimlerChrysler argues that plaintiff failed to state a claim of sexual harassment under the Michigan Civil Rights Act (CRA) because she did not show that defendant's response to the six reported incidents of sexual harassment was inadequate. Second, defendant argues that it is entitled to a new trial because of the persistent and blatant misconduct of plaintiff's trial counsel. Third,

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[9] 468 Mich. 883, 661 N.W.2d 232 (2003). We also granted motions from the Michigan Chamber of Commerce and the United States Chamber of Commerce to file briefs amicus curiae, and solicited additional briefs amicus curiae from interested parties.

defendant maintains that the trial court committed error requiring reversal by admitting the opinion testimony of a social worker on medical issues and that this error was exacerbated by plaintiff's use of that testimony to inflame the jury. Finally, DaimlerChrysler argues that the $21 million verdict received by plaintiff is so excessive and so clearly punitive that it is entitled to remittitur.

II. ANALYSIS

A. STANDARD OF REVIEW

A trial court's decision to grant or deny a motion for a new trial under MCR 2.611 is reviewed for an abuse of discretion.[10] The determination that a trial court abused its discretion "involves far more than a difference in judicial opinion."[11] Rather, a court abuses its discretion "when 'an unprejudiced person' considering 'the facts upon which the trial court acted, [would] say that there was no justification or excuse for the ruling made.'"[12]

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[10] *Kelly v Builders Square, Inc*, 465 Mich. 29, 34; 632 N.W.2d 912 (2001).

[11] *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich. 219, 227; 600 N.W.2d 638 (1999).

[12] *People v Hendrickson*, 459 Mich. 229, 235; 586 N.W.2d 906 (1998) (opinion by KELLY, J.), quoting *Detroit Tug & Wrecking Co v Wayne Circuit Judge*, 75 Mich. 360, 361; McGrath 859; 42 NW 968 (1889).

B. DEFENDANT'S MOTION FOR A NEW TRIAL

Defendant moved for postjudgment relief on a number of grounds. One of the grounds was that the verdict was the product of prejudice and passion. According to defendant, plaintiff's counsel had repeatedly equated plaintiff's experiences to those of the victims of the Holocaust, and thereby associated defendant's new German co-owners with the Nazis who perpetrated that horror. This argument, according to defendant, was bolstered by the expert testimony of a social worker who suggested to the jury that sexual harassment had altered plaintiff's "brain chemistry" and would lead to her untimely and agonizing death. Defendant argued that the excessiveness of the verdict--a $21 million award--palpably reflected the passion and prejudice that plaintiff sought to instill in the jury.

The trial court had the discretion to grant this request for a new trial under MCR 2.611(A)(1), which provides:

> A new trial may be granted to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected, for any of the following reasons:
>
> (a) Irregularity in the proceedings of the court, jury, or prevailing party, or an order of the court or abuse of discretion which denied the moving party a fair trial.
>
> (b) Misconduct of the jury or of the prevailing party.

(c) Excessive or inadequate damages appearing to have been influenced by passion or prejudice.

(d) A verdict clearly or grossly inadequate or excessive.

(e) A verdict or decision against the great weight of the evidence or contrary to law.

(f) Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial.

(g) Error of law occurring in the proceedings, or mistake of fact by the court. . . .

An objective review of the proceedings below leads to the conclusion that the trial court abused its discretion in failing to grant a new trial under MCR 2.611(A)(1)©. The jury verdict is so excessive and so clearly the product of passion and prejudice that there can be no justification for the trial court's denial of defendant's motion for a new trial.

1. AN "EXCESSIVE" VERDICT

In order to grant relief under MCR 2.611(A)(1)©, it is first necessary to determine whether the verdict is "excessive." Because subsection c does not define this term, it must be given its "plain and ordinary meaning[]."[13] "Excessive" is defined as "going beyond the usual, necessary,

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[13] *Koontz v Ameritech Services, Inc*, 466 Mich. 304, 312; 645 N.W.2d 34 (2002).

or proper limit or degree; characterized by excess."[14] In the context of compensatory damages, the determination whether damages exceed the "necessary or proper limit" is no simple task. "The authority to measure damages," as we stated in *Kelly v Builder's Square,* "inheres in the jury's role as trier of fact."[15] Because the amount required to compensate a party for pain and suffering is imprecise, that calculation typically belongs to the jury.[16]

The difficulty of reviewing damage awards, however, does not undermine the judicial obligation to do so under MCR 2.611. A reviewing court is therefore faced with the task of ensuring that a verdict is not "excessive" without concomitantly usurping the jury's authority to determine the amount necessary to compensate an injured party. Given the impossibility of using a simple algorithm for this task, judicial review of compensatory awards must rely on the fundamental principle behind compensatory damages--that of recompensing the injured party for losses proven in the record.

This, in effect, is the rationale behind three of the four factors that a majority of this Court endorsed in *Palenkas v Beaumont.*[17] The *Palenkas* majority stressed that appellate review of jury verdicts must be based on *objective* factors and

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[14] *Random House Webster's Unabridged Dictionary* (2001).

[15] *Id.* at 34.

[16] *Id.* at 35.

[17] 432 Mich. 527, 533; 443 N.W.2d 354 (1989).

firmly grounded in the record.[18] Accordingly, judicial review of purportedly excessive jury verdicts should focus on the following objective factors:

> [1] whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; [2] whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; [and 3] whether the amount actually awarded is comparable to awards in similar cases within the state and in other jurisdictions.[19]

When a verdict is procured through improper methods of advocacy, misleading argument, or other factors that confound the jury's quantification of a party's injuries, that amount is inherently unreliable and unlikely to be a fair estimate of the injured party's losses. Likewise, when a verdict is unsupported by the record or entirely inconsistent with verdicts rendered in similar cases, a reviewing court may fairly conclude that the verdict exceeds the amount required to compensate the injured party.

When analyzing a verdict according to the *Palenkas* factors, courts must be mindful of the fact that punitive damages are available in Michigan *only* when expressly authorized by the Legislature.[20] Here, the Civil Rights Act

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[18] *Id.* at 532-33.

[19] *Id.*

[20] *Rafferty v Markovitz*, 461 Mich. 265, 270-271; 602 N.W.2d 367 (1999). Punitive damages are authorized, for example, by MCL

does not authorize punitive damages--and, moreover, permits compensation only for "injury or loss caused by each violation of this act, including reasonable attorney's fees."[21] Thus, the court has a statutory obligation under the CRA to ensure, through consideration of the objective factors described by *Palenkas*, that this damage award serves the ends articulated by the Legislature.[22]

We turn first to the question "whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact . . ."[23] As shown in greater detail in Part II(B)(2), we have concluded that this verdict was the product of misleading argument, inflammatory rhetoric, and the improper admission of expert

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750.147.

[21] MCL 37.2801(3).

[22] There is also an overarching constitutional issue to consider. In *State Farm Mut Automobile Ins Co v Campbell*, 538 U.S. 408, 416; 123 S. Ct. 1513; 155 L. Ed. 2d 585 (2003), the United States Supreme Court concluded that "the Due Process Clause of the [United States Constitution's] Fourteenth Amendment prohibits imposition of grossly excessive or arbitrary punishments on a tortfeasor." While *State Farm* dealt with punitive damage awards, the due process concerns articulated in *State Farm* are arguably at play regardless of the label given to damage awards. A grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled "punitive." In this case, however, there is no need to reach this constitutional question, given the necessity of reversal on other grounds.

[23] *Palenkas*, supra at 532.

opinion testimony utterly lacking in scientific support.[24] The first *Palenkas* factor listed above therefore provides strong support for the conclusion that this verdict is "excessive," as that term is used in MCR 2.611(A)(1)©.

The second *Palenkas* factor addresses "whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained . . ."[25] This inquiry into the reasonableness of the verdict concerns, in essence, whether the verdict is supported by the record. Here, it is apparent that the jury verdict is unsupported by the evidence in one sense. The jury awarded plaintiff $1 million in trust for future medical expenses and "loss of future earning capacity," despite the fact that plaintiff failed to demonstrate any economic harm in the present, much less a "loss of future earning capacity." In fact, according to her counsel, plaintiff continues to earn almost $100,000 a year with overtime pay as an employee of defendant. Similarly, there was no evidence regarding the nature of medical treatment that plaintiff may have to undergo in the future or the likely cost of that treatment. The jury's estimation of

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[24] The excessiveness of the verdict alone provided a sufficient basis for the trial court to grant a new trial under MCR 2.611(A)(1)(d). But the true abuse of discretion below was not just the trial court's failure to recognize that this verdict was excessive as measured by comparable cases, but its failure to recognize that plaintiff's counsel had engaged in a *deliberate attempt to inflame the jury* that the verdict below was the product of an intentional course of improper conduct. Therefore, this opinion focuses on defendant's motion for a new trial under subsection c.

[25] *Palenkas*, supra at 532.

plaintiff's future economic loss was without support in the record.

The remainder of the verdict--$20 million--was intended to compensate plaintiff for emotional distress, "physical pain and suffering," and the aggravation of her substance abuse. There may be some cases in which it is possible to determine objectively that a compensatory award is or is not supported by the record. But this determination is extremely problematic where damages for emotional distress are at issue. In such cases, comparison with damage awards in comparable cases in this jurisdiction and beyond--the final *Palenkas* factor–becomes most relevant. While the resultant analysis is certainly imperfect, other damage awards may provide a range of what constitutes reasonable compensation for the type of injury suffered by a plaintiff. With this range in mind, the reviewing court may determine whether the verdict appears to be "within the limits of what reasonable minds would deem just compensation for the injury sustained . . . "[26]

Turning finally to the third *Palenkas* factor, the $21 million verdict awarded in this case is far beyond the range of what other juries have determined to be reasonable compensation for injuries similar to--and much worse than--those suffered by plaintiff. To our knowledge, plaintiff's $21 million verdict is the largest amount ever awarded for a single-plaintiff sexual harassment claim in the United States. It is seventy times larger than the maximum award permitted under title VII, the federal civil rights act.[27] Indeed, plaintiff

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[26] *Id.* at 532

[27] *See* 42 USC 1981a(b)(3)(D).

has not cited a *single* compensatory verdict in an employment discrimination action from any court within the United States that arguably rivals the amount awarded to plaintiff.

In responding to defendant's argument that the $21 million verdict is "the largest single-plaintiff sexual harassment award upheld on appeal anywhere in the entire country," plaintiff has argued to this Court:

> Defendant's "other sexual harassment" case analysis is far from honest. Looking only at automobile companies, and ignoring every other case of sexual harassment in any other field of employment in the Country, the largest recovery is a $34,000,000 settlement by Mitsubishi in June of 1998. . . . While Daimler Chrysler may believe that sexual harassment of women is acceptable and insignificant, other automobile manufacturers recognize their responsibilities and the gravity of injury by agreeing to high seven and eight figure settlements to avoid the higher measure of full redress available to a victim like Linda Gilbert who recovers for all losses at trial.

Plaintiff's attack on defendant's "dishonesty" here omits a crucial fact: Mitsubishi's $34 million settlement was in a *class action*.[28] We are unaware, therefore, of any single-plaintiff employment discrimination verdict involving a nonpunitive

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[28] *See*, e.g., Braun, *Mitsubishi to Pay $34 Million in Sex Harassment Case*, Los Angeles Times (June 12, 1998), p A1 (noting that the settlement was distributed among "hundreds of female employees").

award that even arguably approaches the amount awarded to plaintiff, and plaintiff has identified none.

Plaintiff argues that this discrepancy between her verdict and every other sexual harassment verdict in the United States simply reflects the jury's recognition that defendant's conduct was much, much worse than that of any other defendant in a sexual harassment case. While we have no doubt that plaintiff encountered truly ugly conduct at Chrysler given the evidence and testimony adduced at trial, we cannot accept the argument that plaintiff's was the *worst* case of sexual harassment in the history of the country that has resulted in a verdict.

A survey of verdicts rendered in other sexual harassment suits reveals that plaintiffs who endure sexual harassment in its most aggressive form--unwanted touching and persistent, predatory sexual advances--uniformly have received far less in compensatory damages than the amount awarded to plaintiff. For example, in *Griffin v City of Opa-locka,* a party who alleged that she was sexually harassed during a four-month period and was raped by her manager was awarded $2 million.[29] And in *Grow v W A Thomas Co,* the plaintiff alleged that she was subjected to "sexually explicit comments and unwanted kissing and groping" over several years and recovered $192,684.[30]

Indeed, the only plaintiffs who have recovered sexual harassment verdicts that are even arguably comparable to that rendered in this case are those who recovered *punitive*

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[29] 261 F.3d 1295 (CA 11, 2001).

[30] 236 Mich. App. 696, 700; 601 N.W.2d 426 (1999).

damages.[31] Even among cases in which a plaintiff recovered punitive damages for sexual harassment, our research discloses no case in which a party recovered a punitive award that approached or exceeded $21 million that was upheld on appeal.[32]

On the basis of three of the factors articulated by this Court in *Palenkas,* we conclude that the verdict in this case is "excessive" as that term is used in MCR 2.611. Not only does the verdict exceed verdicts in similar cases by leaps and bounds, but, as shown in this opinion, it was awarded by a jury inflamed by hyperbolic rhetoric, prejudice-baiting argument, and unscientific expert testimony.

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[31] *See Weeks v Baker & McKenzie,* 63 Cal App 4th 1128; 74 Cal.Rptr.2d 510 (1998) (the plaintiff, who alleged that she sustained psychological injury from sexual harassment, recovered $50,000 in compensatory damages and approximately $7 million in punitive damages; the latter amount was later reduced to $3.5 million); *Deters v Equifax*, 981 F. Supp. 1381 (D Kan, 1997) (the plaintiff, whose coworkers rubbed and kissed her against her will, received $5,000 in compensatory damages and $1 million from the jury, reduced to $ 300,000 cap under 42 USC 1981a[b]), aff'd 202 F.3d 1262 (CA 10, 2000).

[32] *See, e.g., Channon v United Parcel Service, Inc,* 629 N.W.2d 835, 851 (Iowa, 2001) (the plaintiff, who was subjected to unwelcome touching, sexual comments, and assault, was awarded a verdict including approximately $530,000 in compensatory damages and $80,220,000 in punitive damages--the latter of which was reduced to $300,000 under title VII).

2. PASSION AND PREJUDICE

Having determined that the verdict is excessive, we also conclude excessiveness may be attributed to the effect of plaintiff's efforts to cause the jury to act on passion and prejudice. An objective review of the record leads to an unavoidable conclusion: plaintiff's counsel engaged in a systematic effort to divert the jury from its true task--that of appropriately compensating the plaintiff for any losses suffered as a result of defendant's violation of the CRA–and instead sought to inflame passion and to incite the jury to punish the defendant even while disclaiming that he was seeking punitive damages.

Plaintiff's counsel deliberately tried to provoke the jury by supplanting law, fact, and reason with prejudice, misleading arguments, and repeated *ad hominem* attacks against defendant based on its corporate status. Given the undeniable role of this inflammatory rhetoric, the trial court erred in denying defendant's motion for a new trial.[33]

One of counsel's tactics in this vein was his repeated attempts to equate plaintiff with the victims of the Holocaust. This association began during the testimony of plaintiff's expert, Steven Hnat, when Mr. Hnat testified that plaintiff's psychological state was akin to that of concentration camp survivors. Plaintiff's counsel further developed this theme during his closing argument:

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[33] *See Firchau v Foster*, 371 Mich. 75, 78, 79; 123 N.W.2d 151 (1963) ("Where language is such as evinces a studied purpose to enflame or prejudice the jury, based upon facts not in the case, this Court has not hesitated to reverse.").

> Never again. Never again. That is a line now used by the sabreurs [sic; sabras] in Israel, the land of Israel, to mean that the unspeakable horrors that were perpetrated on the people of Israel, on the Jews, must never be forgotten and must never happen again. Never again. Never again.

Counsel also exhorted the jury to

> provide full and complete justice and thereby, as I indicated at the start of this trial, raise the roof of this courthouse so that justice will ring loud and clear. No more.
>
> As those young [sabras] said in the land of Israel, no more. We will not let this stand. We will not allow this to pass. We will not allow you, you, an equal with all of us in this, the great equalizer, to crush the health and the dreams of a woman who simply had the American dream.

Even the final sentence of plaintiff's closing argument referenced the Holocaust theme: "Let's bury this prejudice once and for all so that we may appropriately say, never again."

This recurring rhetorical theme was especially virulent given the context of plaintiff's trial. In 1998, Chrysler had merged with Daimler Benz AG, a German automobile manufacturer. The merger was highly publicized--particularly in metropolitan Detroit, where plaintiff's trial was held. And if any of the jurors had failed to hear about the merger through media outlets, they were privy to the news once

plaintiff's counsel pointed out during his closing argument that Chrysler was under German ownership:

> Daimler-Chrysler may be powerful, but, my God, they are going to have to recognize, hopefully today by your verdict, that not only must they face justice in this case, they must obey the law.
>
> We are a nation of laws, not powerful individuals. We are a nation of laws . . .
>
> And, I can assure that verdict will be heard from the floor of that plant on Jefferson to the board room in Auburn Hills or Stuttgart. . . .
>
> Once they hear in Auburn Hills and in Germany about Linda . . . it will stop.

Continuing on this theme, counsel argued that the jury now had a chance to acquaint Chrysler's German owners with a distinctly *American* brand of justice:

> [You must] ring that bell of justice even if you have to have it rung across the oceans of this land to their board rooms, wherever they may be.
>
> Chrysler must take notice that it is responsible, under the Constitution and laws of this state, and that we are ringing the bell of justice so that she can walk a little taller and stand a little prouder.

Thus, counsel's closing argument had a clear rhetorical aim of making defendant's German ownership a critical issue in the minds of the jurors. By associating plaintiff with those

who had endured inhuman treatment in concentration camps, counsel likened defendant DaimlerChrysler--which, as the jury was informed, was partially under German ownership--with the Nazis. This argument was an attempt to incite the jury to heap upon the *defendant* the moral outrage that is now reserved for the Nazis and those who assisted them in carrying out the Holocaust. It was, in other words, a naked appeal to passion and prejudice and an attempt to divert the jury from the facts and the law relevant to this case.

Besides associating defendant with one of the most destructive and inhumane forces in modern history, counsel attempted artfully to convince the jury that defendant itself had *physically* harmed plaintiff, when there was no record of physical injury in the record. In describing plaintiff's refusal to quit her position as a millwright, counsel argued:

> She stayed. She was not going to give up. *You could kick her. You could torture her.* You could harass her. You could put her in hospitals, but she was going to claw. She was going to hold on. She was going to do whatever was necessary to not lose that last shred of humanity that made her pull--that constitutes the soul, the thread, that will live on forever after she is gone. [Emphasis added.]

Plaintiff's counsel also equated plaintiff with a dog that had been kicked, beaten, and physically abused on a daily basis. Although counsel was quick to point out that he was not saying that plaintiff was *actually* a dog, he failed to mention that there was absolutely no evidence that plaintiff had been physically abused in any way by any employee of defendant.

Plaintiff's counsel also played on prejudice against corporations, arguing that DaimlerChrysler thought that it did not have to obey the law simply because of its corporate status:

> You [defendant] are not God Almighty sitting on the mountain. You are not Zeus . . .
>
> We will hold you to the same standard we will hold to anyone else, because their attitude speaks volume [sic] of their belief that they are above being held to the same standard as a lowly woman millwright would be held to.

Later, plaintiff's counsel argued:

> Apparently . . . when you enter the confines of a multi, a very, very successful business over on Jefferson, that the laws of civility don't apply.
>
> That they are . . . permitted under the laws and the Constitution of this state to be less civil and less respectful of civil rights. . . . They think, they must think that it is okay with you that this type of thing went on day after day. That it was okay to treat a woman the way Linda was treated.
>
> That it was okay with you that they tried to take away a woman's livelihood, the first and only female millwright ever employed at that plant. That it is okay to humiliate and degrade a woman as she tries to earn and do her best[.]

Equally telling is counsel's argument that "[plaintiff was] discriminated against twice, because she is not Lee Iacocca. She is just a millwright."

There was no evidence presented at trial suggesting that anyone employed by defendant thought incorporation relieved it of the obligation to follow the law. Nor was there evidence that anyone in the management of DaimlerChrysler approved of sexual harassment or would have responded differently had a corporate officer been the subject of sexual harassment.

These arguments were little more than pleas for the jury to consider defendant's corporate status rather than its true liability under the CRA. However justifiable counsel's moral indignation over the treatment plaintiff encountered while working for DaimlerChrysler, that indignation does not and cannot justify rhetoric that attempts to inflame passion and prejudice and that intentionally subverts the jury's fact-finding role.

Finally, plaintiff's counsel attempted to inject passion and prejudice into the adjudication of this matter by deliberately and repeatedly using language that calls for punitive rather than compensatory damages. A number of these pleas for punitive damages have already been cited. One request for punitive damages was particularly overt:

You must consider the days, the minutes, the hours, and the weeks that she went through for seven years, and for as long as God gives her on this plant [sic], God help her, and allows her to maintain on this plant [sic], despite the disease that she is suffering from, the diseases that she will suffer from, and that will kill her, you must consider that, and so that your verdict reflect the enormity of the wrong, the

intolerable nature of the injury, the extent of the humiliation, the torture, the extent of the outrage perpetrated upon, I can suggest, and you can go back in your jury room, and you determine whether this is right. That is should be more, that it should be less.

> But I suggest to you that you award as full and complete justice for the seven years of past and for the future, whatever it holds, $140,000,000.00. You can break that any way you want . . . .
>
> The hopes and dreams of all free Americans exist in Linda the way they do in all of us.
>
> And to destroy those, and to subject anyone to the type of indignity and injustice and intolerable acts that this woman has been subjected to for the past seven years, that figure reflects a symbol, if you will, since you can't adequately compensate her for every . . . .

This soliloquy stopped briefly only when defense counsel objected to this use of punitive damages rhetoric and the court gave a curative instruction.

The verdict rendered by the jury, however, showed that the damage had been done--that counsel's inflammatory rhetoric had its intended effect. Instead of awarding plaintiff an amount that fully and fairly compensated her, the jury returned a verdict that responded to plaintiff's request that they "send a message" to Chrysler.

Counsel's persistent and deliberate efforts to incite passion and prejudice distinguish this case from those in which

inflammatory remarks were fleeting and unintentional.[34] Plaintiff's counsel has been admonished in two published Court of Appeals opinions since this trial for precisely the same sort of hyperbolic and vitriolic argument he made on behalf of Linda Gilbert.[35] Overreaching, prejudice-baiting

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[34] *See, e.g.,People v Bahoda,* 448 Mich. 261; 531 N.W.2d 659 (1994) (rejecting the defendant's claim of prosecutorial misconduct where references to the defendant's ethnicity were "innocuous, unintended, and not of a degree that prejudiced the defendant's right to a fair trial").

[35] In *Powell v St John Hospital,* 241 Mich. App. 64; 614 N.W.2d 666 (2000), the Court of Appeals "admonished" counsel for misconduct that included his efforts to "gratuitously insert[]" the issue of race into a medical malpractice claim, [his] repeated "belittleing" of witnesses, his inappropriate assertion that the decedent had been "tortured," and his personal attacks against defense counsel.

Earlier, in *Badalamenti v Beaumont Hosp-Troy*, 237 Mich. App. 278, 281; 602 N.W.2d 854 (1999), the Court of Appeals held that counsel's misconduct was so pervasive that it would have provided a separate basis for a new trial. Again, in *Badalamenti,* that Court rebuked counsel for his personal attacks against the defendant and defense counsel, his repeated argument that the defendant was greedy and only cared about money, and that his appeal to the jurors' self-interest as taxpayers. The panel concluded:

> [Plaintiff's counsel] sought to divert the jurors' attention from the merits of the case and to enflame the passion of the jury. That strategy paid off handsomely here in the form of a large verdict for plaintiff. The cumulative effect of the improper innuendo, remarks, and arguments by plaintiff's lead trial counsel was so harmful and so highly prejudicial that we are unable to conclude that the verdict

rhetoric appears to be a calculated, routine feature of counsel's trial strategy. This deliberate use of improper argument, coupled with the astonishingly excessive verdict rendered against defendant, precludes us from concluding that counsel's misconduct was "innocuous" and "unintended."

In fact, plaintiff's counsel's behavior during trial is remarkably similar to what necessitated a new trial in *Reetz v Kinsman Marine Transit Co.*[36] The plaintiff in *Reetz* was injured when he fell into an open hatch while working as a deckhand. The vessel on which the plaintiff sustained his injuries was owned by Kinsman Marine Transit Company, and George Steinbrenner, III, served as chairman of the board for Kinsman's parent company. Reetz's counsel made Kinsman's corporate status an issue at trial, arguing that Kinsman "cared nothing about Reetz's welfare . . . ."[37] Further, Reetz's counsel made "repeated references" to Mr. Steinbrenner, despite the fact that Mr. Steinbrenner had no personal involvement in the case.[38] We concluded in *Reetz* that

> the effect of these comments was to create in the minds of the jurors an image of Kinsman as an unfeeling, powerful corporation controlled by a ruthless millionaire. Even a juror who harbored no prejudice against corporations or millionaires might

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in this case was not affected. [*Id.* at 292.]

[36] 416 Mich. 97; 330 N.W.2d 638 (1982).

[37] *Id.* at 110.

[38] *Id.*

> have been swayed by these inflammatory remarks to alter his view of the evidence.[39]

On the basis of counsel's *ad hominem* attacks against the defendant and his numerous references to multimillion dollar verdicts in other cases, we concluded that the jury had been incurably tainted and a new trial was necessary.[40]

The parallel to arguments made by plaintiff's counsel in this case is striking. Here, however, the anticorporate rhetoric was even less subtle than that supporting a new trial in *Reetz*.[41] And instead of referring to other multimillion dollar verdicts, counsel repeatedly utilized language calling for punitive damages.[42] Therefore, we conclude that

> "the record in the instant case shows a deliberate course of conduct on the part of counsel for plaintiff aimed at preventing defendant from having a fair and impartial trial. We think the course of misconduct was so persistently followed that a charge of the Court in

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[39] *Id.* at 111.

[40] *Id.* at 107, 112.

[41] *See, e.g.*, p 29 ("Apparently . . . when you enter the confines of a multi, a very, very successful business over on Jefferson, . . . the laws of civility don't apply.").

[42] *See* p 27.

an effort to obviate the prejudice would have been useless."[43]

When faced with defendant's motion for postjudgment relief under MCR 2.611, the trial court had no reason to deny relief and every reason to grant it. In making its ruling on defendant's posttrial motions, the trial court clearly ignored the prominence of prejudicial rhetoric in plaintiff's closing argument and the effect that this rhetoric had on the jury.

The trial court's failure to grant a new trial was, therefore, an abuse of discretion. We reverse the judgment of the Court of Appeals and remand this action to the circuit court for proceedings in accordance with this opinion.

C. MRE 702 & THE EXPERT OPINION TESTIMONY OF STEVEN HNAT

In order to provide guidance for the new trial, we address the controversy surrounding the expert testimony and the erroneous standard propounded by the Court of Appeals concerning the gate keeping role required by MRE 702. We now clarify that MRE 702 requires the trial court to ensure that each aspect of an expert witness's proffered testimony--including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data--is reliable.

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[43] *Reetz* at 111-112, quoting *Steudle v Yellow & Checker Cab & Transfer Co,* 287 Mich. 1, 11-12; 282 N.W. 879 (1938).

1. THE COURT'S GATEKEEPER ROLE UNDER MRE 702

MRE 702, as it existed at the time of trial,[44] provided:

> If the trial court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In both its former and current incarnations,[45] MRE 702 has imposed an obligation on the trial court to ensure that any

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[44] MRE 702 was amended effective January 1, 2004, to particularize the kind of gatekeeper inquiry the trial court is required to make. MRE 702 now states:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[45] *See* n 18 and accompanying text.

expert testimony admitted at trial is reliable.[46] While the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither "abandon" this obligation nor "perform the function inadequately."[47]

Indeed, the obligation imposed by MRE 702 is reinforced by MRE 104(a), which provides that "preliminary questions concerning the qualification of a person to be a witness . . . *shall* be determined by the court . . . ."[48] The requirements of MRE 104(a) extended to the application of MRE 702 because the admission of expert testimony under this rule hinges on

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[46] *See* MRE 702 (providing that expert testimony is admissible "if the court determines" that certain preconditions are met). *See also Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579, 589; 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (concluding from similar language in Federal Rule of Evidence 702 that "the trial judge *must ensure* that any and all scientific testimony or evidence admitted is not only relevant, but reliable" [emphasis added]).

In fact, the trial court's obligation under MRE 702 is even stronger than that contemplated by FRE 702 because Michigan's rule specifically provides that the court's determination is a precondition to admissibility. Compare FRE 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . .") with the older MRE 702 ("If *the court determines* that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." [Emphasis added.]).

[47] *Kumho Tire Co Ltd v Carmichael*, 526 U.S. 137, 158-159; 119 S. Ct. 1167; 143 L. Ed. 2d 238 (1999) (Scalia, J., concurring).

[48] MRE 104(a) (emphasis added)..

preliminary questions concerning qualification. For example, reference in MRE 702 to "scientific" evidence "implies a grounding in the methods and procedures of science," and the rule's reference to "knowledge" "connotes more than subjective belief or unsupported speculation."[49] As such, MRE 104 requires the trial court to address these preconditions before admitting expert testimony.

It is well-established that the proponent of evidence "bears the burden of establishing relevance and admissibility."[50] At the time this case was tried, the proponent of expert opinion evidence bore the burden of establishing admissibility according to the *Davis-Frye* "general acceptance" standard.[51] MRE 702 has since been amended explicitly to incorporate *Daubert*'s standards of reliability. But this modification of MRE 702 changes only the factors that a court may consider in determining whether expert opinion evidence is admissible. It has not altered the court's fundamental duty of ensuring that *all* expert opinion testimony--regardless of whether the testimony is based on "novel"[52] science--is reliable.

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[49] Daubert, supra at 590

[50] *People v Crawford*, 458 Mich. 376, 388 n 6; 582 N.W.2d 785 (1998) (describing this rule as "basic hornbook law").

[51] *See People v Davis*, 343 Mich. 348; 72 N.W.2d 269 (1995); *Frye v United States*, 54 App DC 46; 293 F 1013 (1923).

[52] *See, e.g., People v Young*, 418 Mich. 1, 24; 340 N.W.2d 805 (1983). Because the court's gatekeeper role is mandated by MRE 702, rather than *Davis-Frye*, the question whether *Davis-Frye* is applicable to evidence that is not "novel" has no bearing on whether the court's gatekeeper responsibilities extend to such evidence. These responsibilities are mandated by MRE 702 irrespective of

Thus, properly understood, the court's gatekeeper role is the same under *Davis-Frye* and *Daubert*.[53] Regardless of which test the court applies, the court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability. In other words, both tests require courts to exclude junk science; *Daubert* simply allows courts to consider more than just "general acceptance" in determining whether expert testimony must be excluded.

This gatekeeper role applies to *all stages* of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology.[54]

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whether proffered evidence is "novel." *See* MRE 702; *see also General Electric Co v Joiner*, 522 U.S. 136, 142; 118 S. Ct. 512; 139 L. Ed. 2d 508 (1997) (noting that FRE 702 overruled *Frye* but left intact the court's gatekeeper responsibilities).

[53] *See Joiner*, *supra* at 142 ("While the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*, *they leave in place the 'gatekeeper' role of the trial judge in screening such evidence*." [Emphasis added.]).

[54] *See, e.g.*,*Porter v Whitehall Labs, Inc*, 9 F.3d 607, 615-617 (CA 7, 1993) (holding that the district court properly excluded expert testimony in which the expert's theory that the plaintiff's injuries

Careful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation.[55] The United States Supreme Court's caveat in *Joiner* is persuasive:

> Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.[56]

When a court focuses its MRE 702 inquiry on the data underlying expert opinion and neglects to evaluate the extent to which an expert extrapolates from those data in a manner consistent with *Davis-Frye* (or now *Daubert*), it runs the risk of overlooking a yawning "analytical gap" between that data and the opinion expressed by an expert.[57] As a result, ostensibly legitimate data may serve as a Trojan horse that facilitates the surreptitious advance of junk science and spurious, unreliable opinions.

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were caused by ingestion of ibuprofen failed under *Daubert*).

[55] *See, e.g., Diaz v Johnson Matthey, Inc,* 893 F. Supp. 358, 377 (D NJ, 1995) (concluding that an expert's "testimony on specific causation [was] not sufficiently reliable to be admissible under Rule 702").

[56] *Joiner*, supra at 146.

[57] *Id.*

2. MR. HNAT'S MEDICAL OPINION TESTIMONY

Both the trial court and the Court of Appeals seem unaware of the core gatekeeper principles described above. As a result, the faux "medical" opinion of an individual who lacked any medical education, experience, training, skill, or knowledge became the linchpin of plaintiff's case and unmistakably affected the verdict.

Plaintiff's theory at trial was that the sexual harassment she encountered as defendant's employee had produced a permanent change in her "brain chemistry," that this neurological change led to an increase in substance abuse and that, in the end, defendant's failure to curb sexual harassment in plaintiff's workplace would cause her to die the most painful death imaginable because of the metabolic physiological phenomena he described.[58] The theory was presented through the testimony of Mr. Hnat, a social worker, and was based on his analysis of medical records from various hospitals and clinics where plaintiff was treated for substance abuse.

Mr. Hnat testified that he was a certified social worker with experience in substance abuse treatment.[59] He also

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[58] Mr. Hnat told the jury that "pancreatitis is the worse [sic] pain a person could experience. The pancreas as you know is very innervated [sic] and when you develop pancreatitis that is the most painful way to die."

[59] A social worker is certified in Michigan under MCL 333.18511. "Social work," as used in this section, is defined as

testified that he had received a master's degree in psychobiology, although it was revealed after trial that this testimony was patently false.[60]

> the professional application of social work values, principles, and techniques to counseling or to helping an individual, family, group, or community do 1 or more of the following:
>
> (i) Enhance or restore the capacity for social functioning [or]
>
> (ii) Provide, obtain, or improve tangible social and health services. [MCL 333.18501(1)(d)].

[60] Mr. Hnat was allowed to testify based in part on his assertions--both in court and in a written resume submitted as an exhibit--that he had a master's degree in psychobiology from the University of Michigan and that he had received the prestigious Pillsbury Prize in psychology as an undergraduate. Defendant discovered after trial that both statements were false. Contrary to his sworn testimony, plaintiff had neither obtained a master's degree in psychobiology nor received the Pillsbury Prize as an undergraduate.

We disagree with the Court of Appeals' suggestion that the trial court could have legitimately concluded that Mr. Hnat "had simply misspoken" when he said that he had a Master's degree in psychobiology and had won the Pillsbury Prize. Slip op p 30. We doubt that anyone could honestly *misspeak* about having a degree that he did not, in fact, possess, much less that he could "misspeak" in a written resume. We also disagree with the lower courts' conclusion that there is no real difference between completing coursework necessary for a degree and actually *receiving* a degree. Unless and until an educational institution confers a degree, which is the institution's official determination that a student has met all the requirements, an expert witness may not, consistent with the

Apparently influenced by Mr. Hnat's claim to have expertise in psychobiology, the trial court permitted plaintiff to introduce medical records through Mr. Hnat's testimony. Before the admission of records from Sacred Heart Rehabilitation Center, defense counsel raised the following objection:

> Your Honor, I object to their admission. Certainly, with regard to this witness, he is not a medical doctor to review all of these other records and testify about them. He is a social worker and he is competent to testify about his own records.
>
> It is just not appropriate. The foundation hasn't been laid for the introduction of those records, certainly not pursuant to this individual.

The trial court rejected defendant's argument that Mr. Hnat was unqualified to articulate an opinion based on records compiled when plaintiff sought treatment for substance abuse. However, the record in this case reveals that, irrespective of whether the medical records detailing plaintiff's substance abuse treatment were admissible, Mr. Hnat was asked to

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oath, affirmatively represent to having "received" the degree.

This discrepancy in Mr. Hnat's qualifications could not have been inadvertent and ought to have given the trial court additional pause while evaluating the defendant's JNOV motion. In addition, the falsification of Mr. Hnat's credentials supports our concern that the trial of this case was rife with unseemly tactics by plaintiff's counsel.

interpret those records and thereby render an opinion that he was wholly unqualified to give.

For example, the following exchange took place during plaintiff's direct examination of Mr. Hnat:

> *Q.* Will [plaintiff] be able to work in light of what you know about her condition as recently as yesterday? Will she continue to be physically able to work?
>
> *A.* No. *Her medical complications at this point have progressed to the point where she is going to be physically unable to work fairly soon.*
>
> She is going to have increasing hospitalizations most likely to deal with the cirrhosis, the pancreatitis, she may need transplants at some point, she may need any range of radical medical intervention. So her ability to work physically is severely impaired at this point even though right now she is functioning okay. There is going to be increasing problems associated with this medical condition. It's unavoidable. People have those severe complications must work [sic].
>
> *Q.* Do you have any idea what was the cause of her problems as they exist in this lady as late as yesterday?
>
> *A.* Alcoholism, major depression precipitated by work stresses, and sexual harassment. That is the bottom line.

Q. What do you mean that is the bottom line?

A. I mean that is what happened here, *that is what is killing this person, probably has killed her as far as you can tell at this point. I wouldn't bet on her living very long*. She might, if she gets treatment. There's a chance. If she doesn't get treatment, she'll die fairly soon. [Emphasis added.]

The impact of Mr. Hnat's "medical opinion" on the verdict rendered in this case could not have been more pronounced. Especially noteworthy is the fact that, during closing arguments, plaintiff's counsel encouraged the jury to treat Mr. Hnat's opinion as an actual medical prognosis:

You heard testimony, and I don't think Mr. Hnat was being glib when he testified about the fact that although he is not an omniscient, he is not a sooth sayer, he has read her death certificate.

Her death certificate, her death will come sooner or later, none of us can know for sure. You will consider this in a haze of alcohol. She will die either in a violent event if she drives, or she will die of the effects of alcohol on her body. She will have chronic hepatitis, in other words, a disease of the liver, cirrhosis, if you will. She will have dehydration as Mr. Hnat testified to. She will have metabolic acidosis that will slowly put her into a coma.

She will have increased red blood cells, or low blood cells to fight infection. She will have chronic pancreatitis. One of the most painful diseases known

> to medical science, inflammation of her pancreas. And she has suffered all of these during hospitalizations, as Mr. Hnat has testified to.
>
> She will suffer severe abdominal pain, and she will die. And she will not live out her life.

At one point during closing arguments, plaintiff's counsel even told the jury that plaintiff had to leave the courtroom for a portion of his closing argument because the "prognosis that she has for her life" was too grim for her to hear.[61]

As these excerpts reveal, Mr. Hnat unquestionably used the content of plaintiff's treatment records to render an opinion that required *medical* expertise. He speculated about plaintiff's impending physical inability to work, testified about the type of medical complications that plaintiff would soon experience, predicted the cause of her death, and gave testimony concerning plaintiff's life expectancy. Mr. Hnat expressed his "opinion" on physiological disease, cause of death, and plaintiff's lifespan. Yet there was no evidence or showing that Mr. Hnat was qualified by training, experience, or knowledge to render such opinions or interpret medical records that would arguably support such a diagnosis or prognosis. There was, in other words, no evidence that Mr. Hnat was qualified to testify that defendant's actions

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[61] After plaintiff left the courtroom (apparently at counsel's request), counsel told the jury, "While it is necessary for me to review evidence, I don't believe that it is necessary for me to review statements made by doctors in front of Linda Gilbert with regard to the prognosis that she has for her life, because I don't believe that it is my job here to rob her of whatever hope that she may have for the future."

concerning workplace harassment *caused* neurological and physiological changes in plaintiff and shortened her life.

Plaintiff's arguments in support of Mr. Hnat's testimony and the Court of Appeals' acceptance of those arguments can be based only on a misinterpretation of MRE 702. Plaintiff argued, for example, that Mr. Hnat was qualified to interpret plaintiff's medical records because he is a "treater." In order for Mr. Hnat to provide an admissible opinion interpreting medical records for purposes other than those related to the expertise of social workers, plaintiff bore the burden of showing that Mr. Hnat was qualified by knowledge, skill, experience, training, or education in *medicine*. Given the absence of such evidence, plaintiff failed to carry the burden of establishing the admissibility of Mr. Hnat's medical opinions, regardless of the admissibility of the records that ostensibly informed this opinion.

Likewise, we reject the Court of Appeals' argument that "the 'mere fact' that Mr. Hnat 'is not a medical practitioner does not render him unqualified as an expert witness'" because "any limitations in" Mr. Hnat's "qualifications are relevant to the weight, not the admissibility, of his testimony."[62] The Court of Appeals' observation that one need not be a medical practitioner to testify as an expert is little more than a truism. And we do not disagree with the proposition that, in some circumstances, an expert's qualifications pertain to weight rather than to the admissibility

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[62] Slip op at 33-34, quoting *Grow*, 236 Mich. App. 696 at 713 at 713-714.

of the expert's opinion.[63] That is not to say, however, that *any* issue of qualification relates to weight rather than admissibility.

As shown, MRE 702 establishes preconditions for the admission of expert opinion. Such testimony must be rooted in "recognized *scientific*, technical, or other specialized *knowledge*" and must assist the trier of fact. The burden is on the party *offering* the expert to satisfy the preconditions established by MRE 702.[64]

Where the subject of the proffered testimony is far beyond the scope of an individual's expertise--for example, where a party offers an expert in economics to testify about biochemistry--that testimony is *inadmissible* under MRE 702. In such cases, it would be inaccurate to say that the expert's lack of expertise or experience merely relates to the weight of

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[63] In *Grow*, for example, the Court of Appeals held that the testimony of a certified social worker with fourteen years of experience in counseling "victims of sexual, physical, and emotional abuse" was admissible on the issue of plaintiff's posttraumatic stress disorder. *Id.* at 713. Because the social worker in *Grow* had actual experience in counseling persons suffering from posttraumatic stress disorder, his testimony was admissible under MRE 702, which refers to a witness "qualified as an expert by knowledge, skill, *experience*, training, or education . . . ." (Emphasis added.) If the defendant in *Grow* had offered the expert opinion of a *psychiatrist* with experience in treating posttraumatic stress disorder, the more limited qualifications of the plaintiff's certified social worker would have been relevant to the weight of his testimony even though they would not have barred its admission.

[64] *Crawford*, supra at 388 n 6.

her testimony. An expert who lacks "knowledge" in the field at issue cannot "assist the trier of fact."

Here, according to plaintiff's counsel, Mr. Hnat gave plaintiff a "prognosis" on the basis of his interpretation of records from medical and treatment facilities. The medical "prognosis" of a social worker who has no training in medicine and lacks any demonstrated ability to interpret medical records meaningfully is of little assistance to the trier of fact.

We also reject the Court of Appeals' assertion that Mr. Hnat's medical testimony on the physiological effects of alcoholism and depression was admissible because these effects are "common knowledge."[65] As the United States District Court for the Eastern District of Michigan has aptly stated:

> Expert testimony is not admissible unless it will be helpful to the fact finder. Such testimony is unhelpful when it is unreliable or irrelevant, as the [Supreme] Court observed in *Daubert*, . . . *and also when it merely deals with a proposition that is not beyond the ken of common knowledge.*[66]

To justify the admission of an expert opinion on the basis of the belief that *no* expertise is necessary to render such an opinion is to fail to give any effect to MRE 702, and, indeed,

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[65] *See* slip op at 34.

[66] *Zuzula v Abb Power T & D Co, Inc*, 267 F. Supp. 2d 703, 711 (ED Mich, 2003) (emphasis added).

to turn that rule on its head. The previous MRE 702 allowed expert opinion testimony only "if the trial court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. . . ." Thus, the Court of Appeals panel's rationalization that Mr. Hnat's expert opinion testimony was harmlessly admitted because it was based on "common knowledge" is inconsistent with the requirements of MRE 702.

Unless information requiring expert interpretation actually goes through the crucible of analysis by a qualified expert, it is of little assistance to the jury and therefore inadmissible under MRE 702. We direct the trial judge on retrial to ensure that expert opinion testimony meets the purpose expressed in MRE 702--that of assisting the trier of fact through the introduction of reliable "scientific, technical, or other specialized knowledge."

D. THE SUFFICIENCY OF PLAINTIFF'S CLAIM UNDER THE CRA

We turn finally to defendant's claim that the trial court erred by admitting evidence regarding incidents of sexual harassment of which defendant was never properly notified. Defendant moved in limine to exclude incidents that plaintiff reported for the first time at her deposition. The court denied that motion, concluding that the jury could consider each incident in order to determine whether defendant had actual or constructive notice that plaintiff was subjected to a hostile environment. The Court of Appeals employed a similar logic in concluding that each incident was admissible.

While the trial court did not err in denying defendant's motion to exclude those incidents,[67] this ruling has resulted in substantial confusion. We now clarify the legal justification for the trial court's decision in order to minimize confusion during retrial.

Under the Civil Rights Act, an employer may be liable for an employee's sexual harassment when the employer has notice of the harassment and fails to take appropriate corrective action.[68] In *Chambers,* we held that "notice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring."[69]

When a plaintiff describes an incident of sexual harassment for the first time at her deposition, evidence pertaining to that incident may be admissible under two

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[67] We do not mean to say, however, that every incident described at trial was admissible to support a claim of sexual harassment. In *Haynie v Michigan,* 468 Mich. 302; 664 N.W.2d 129 (2003), we stressed that sexual harassment is defined by statute as "'unwelcome *sexual* advances, requests for *sexual* favors, and other verbal or physical conduct or communication of a *sexual* nature . . . .'" *Id.* at 309, quoting MCL 37.2103(I) (emphasis added). Some of the incidents described during this trial were not sexual in nature and therefore were improperly admitted to support plaintiff's theory of sexual harassment. *Haynie* shall control the admission of evidence at the retrial.

[68] *Chambers v Trettco, Inc,* 463 Mich. 297, 312; 614 N.W.2d 910 (2000).

[69] *Id.* at 319.

rationales. First, such evidence may be admissible in order to establish the nature and extent of the hostile environment to which the plaintiff was subjected and the adequacy of the defendant's response upon being notified about sexual harassment. Second, that evidence may be admissible under a "constructive notice" theory when a plaintiff contends that sexual harassment was so pervasive that her employer *should* have known of the need for corrective measures.[70]

In this case, plaintiff gave actual notice to defendant through defendant's formal reporting procedures before initiating this lawsuit. Any incidents that she described for the first time at her deposition were admissible in order to establish an element of her hostile environment claim--that "the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created *an intimidating, hostile, or offensive work environment,*"[71] --and to establish the inadequacy of defendant's response to that hostile environment. Therefore, the circuit court did not err by denying defendant's motion to exclude evidence of any incident that plaintiff described for the first time at her deposition.

III. CONCLUSION

For the foregoing reasons, we conclude that the trial court abused its discretion in denying defendant's motion for a new trial under MCR 2.611. Once the jury issued its verdict, it

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[70] *See id.*

[71] *Id* at 311 (emphasis added).

should have been apparent to the trial court that the persistent and calculated efforts of plaintiff's trial counsel to thwart the jury's fact-finding role had borne fruit. The jury's deliberations had been palpably affected and this wrought substantial harm to defendant's right to a fair trial. This case is remanded to the Wayne Circuit Court for a new trial to be held consistently with this opinion.

Robert P. Young, Jr.

Maura D. Corrigan

Clifford W. Taylor

Stephen J. Markman

DISSENTBY: CAVANAGH

DISSENT: CAVANAGH, J. (*dissenting*).

This case is about male employees sexually harassing a female employee and an employer that did very little to try to make it stop. This case is *not* about plaintiff's counsel's "routine" behavior, contrary to the assertions of the majority. *Ante* at 33. Whatever plaintiff's counsel may have done in past cases is irrelevant to *this particular case*. In this case, an objective review of the evidence indicates that plaintiff overwhelmingly provided facts to prove that she was sexually harassed and that defendant conducted an inadequate investigation into this harassment. Defendant's inadequacies in the work place continued in the courtroom as it selected a trial strategy intended to "blame the victim" for the harassment that occurred. Defendant's repeated errors in judgment should not now be redressed by this Court.

The majority remands this matter for a new trial because it asserts that the trial court abused its discretion in denying defendant's motion for a new trial. The majority claims that "it should have been apparent to the trial court that the persistent and calculated efforts of plaintiff's trial counsel to thwart the jury's fact-finding role had borne fruit." *Ante* at 54. I disagree and believe there was substantial admissible evidence for the jury to hold defendant liable. Therefore, I respectfully dissent.

I. EVIDENCE OF HARASSMENT AND THE CONDUCT OF PLAINTIFF'S COUNSEL

The majority states that "the jury's verdict unmistakably reflects passion rather than reason and prejudice rather than impartiality." *Ante* at 4. I disagree. The standard for reviewing defendant's motion for a new trial, MCR 2.611, is the abuse of discretion standard. *Brown v Arnold*, 303 Mich. 616, 627; 6 N.W.2d 914 (1942). An abuse of discretion occurs "only when the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich. 219, 227; 600 N.W.2d 638 (1999) (citations and internal quotation marks omitted). While the majority clearly disagrees with the verdict, there was ample testimony from numerous witnesses to support the jury's verdict that plaintiff, the first and only female millwright for a lengthy period at defendant's plant, was the victim of sexual harassment and that defendant did not engage in an adequate investigation or remedial action to stop this harassment.

An employee in defendant's human resources department testified that the investigation into plaintiff's sexual harassment claims was inadequate.[72] Another employee in defendant's human resources department testified that without being given a name he would not even know where to begin a sexual harassment investigation. Yet another employee in the human resources department testified that she told plaintiff she would provide her with the name and number of a union representative who might be helpful, but the name and number were never provided to plaintiff because the employee never saw plaintiff again.[73] Defendant's corporate representative at trial, who was also one of plaintiff's supervisors, conveyed to the jury that defendant's investigation essentially consisted of passing out defendant's sexual harassment policy and asking the men if they harassed plaintiff or knew who did.[74] The trial representative said he

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[72] *Q*. But we all know that you didn't do any investigation?
A. Not adequately. Yes. As has been brought out here.

* * *

Q. After the Polaroid penis, you did nothing, am I correct, you did nothing, you decided you did everything you could do and you decided not to take any further action, correct.
A. That's what we decided.

[73] *Q*. And you actually never did give Linda [plaintiff] that number because you didn't see her again am I correct?
A. That is correct.

[74] Q. And if somebody didn't come forward to you, apparently, and tell you that they saw so and so do it, that was it?

approached some of the men as a *group* and asked if they knew who was sexually harassing plaintiff. He also said he hoped someone else would do the investigating and that he did not feel it was his responsibility to investigate.[75] The trial

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A. Working with the frame of the union, the local agreements, that's it.

* * *

Q. And you're claiming--by the way, with regard to this [the March 1995 incident, which was the poem "The Creation of a Pussy"] that's the only thing that you know of that-or the only claim quote unquote investigation that you did was ask the men whether they knew who did it; is that what you claim?
A. Yes, sir.
Q. Okay. Now you didn't do it in a systematic fashion, did you?
A. As far as questioning the men?
Q. Right.
A. No, I did not.
Q. You just as you could run into them?
A. As I approached them, yes.

[75] Regarding later incidents, the trial representative testified:

Q. Since you felt that you expected Chrysler [defendant] would assign the lawyers or somebody else to investigate Linda's [plaintiff's] sworn statement regarding the continued and unabated acts of harassment between 1992 and November 4 of 199--on November 3, 1994 when her statement was taken, did you ever see anybody from Chrysler assigned to investigate these claims--not you but somebody else, as a result of the statement?
A. No, I did not.

representative later testified that asking the men if they knew who was responsible for the incidents was inadequate. He further stated that he did not know of any other investigation that was done.

An employee who worked for defendant for thirty-one years testified that he had never seen anyone treated like plaintiff. He stated, "She was relentlessly pounded with derogatory statements, with no help when she was given a job, and there were several people involved on the same job. She would not get a lot of cooperation. She was just basically resented that she was a woman, making a man's wage." The employee also testified that plaintiff was subjected to physical danger by not getting the cooperation she needed, and that other millwrights received, when doing her work. Although millwrights commonly work in pairs, she was often forced to work alone. He testified that this abusive conduct occurred nearly every day, was devastating to plaintiff, and was readily apparent to plaintiff's supervisors. He also testified that supervisors made offensive comments as well. This employee drove plaintiff home from work for a period and testified she cried at least one hundred times on the way home from work. "She never knew what to expect on any given day that she went into work . . . ." He also testified that the stench of urine from a chair in an area set off for plaintiff made it evident that someone had urinated on it. Further, the employee stated that he did not observe any of defendant's employees try to stop the harassment.

Q. So when you said you would have expected the lawyers to do it, even though you expected it apparently nobody at Daimler Chrysler did it, am I correct?
A. Not that I'm aware of.

Plaintiff testified that when she went to work each day she "never knew what to expect." She said abusive comments were essentially an everyday occurrence, and she said she was isolated and ostracized at work. Plaintiff stated that the conduct made her afraid and angry and that she had problems sleeping. She also experienced headaches, stomach problems, and problems associated with her asthma. Plaintiff said she felt hopeless and attempted suicide because she could not get any cooperation or help from defendant.[76] Regarding her suicide attempt, plaintiff said "that's what I did and I regret it, but I just felt pushed to that point where I couldn't take it anymore." Plaintiff said she felt torn up inside and that the harassment was an assault to her person. Plaintiff said she

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[76] Plaintiff testified:

> And I tried to do something about it, and nothing got done about it. People saw what was happening. Nobody would do anything. Nobody would help me.
>
> * * *
>
> I turned things in. There was a, in my opinion, there was a slight attempt at, perfunctory attempt at making a report. After those things were turned in, the guys laughed about it. They thought it was a big joke. The first thing that got turned in. It was a week and a half later that the second thing, picture of the penis was on my tool box.
>
> So, that showed how serious they took everything.
>
> Plaintiff also testified that when she reported that "BITCH" was written on masking tape and fastened to her toolbox, she was told by a supervisor not to show that it bothered her and the harassment may stop. Plaintiff was also told that changing her clothes in a certain location, which was enclosed, was "drawing attention to" herself.

began drinking "to escape" and help dull her feelings. Plaintiff testified that the abusive comments were still being made at the time of the trial, but she was not going to quit over the harassment; she refused to be driven out of her job.

I believe even this limited testimony indicates that there was ample evidence to support the jury's verdict, and I disagree that the verdict was the result of plaintiff's counsel's inflaming the jury with "hyperbolic rhetoric, prejudice-baiting argument, and unscientific expert testimony." *Ante* at 24. Plaintiff's counsel vigorously pursued this case; however, defense counsel's approach was no less vigorous.

Although defense counsel's strategy ultimately proved to be ineffective, and although the majority certainly disagrees with the verdict, it does not necessarily mean that plaintiff's counsel behaved inappropriately. A thorough review of defense counsel's conduct during trial illustrates that defense counsel's strategy was inadequate and, at times, disingenuous.

For example, defense counsel tried to characterize some of the men alleged to have engaged in the harassment as "ornery" and she referred to one as "basically a good guy." She tried to characterize their comments as "shop talk"[77] or "a slip of the tongue," and their conduct as "horseplay."[78]

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[77] Plaintiff testified she "was called a fucking cunt, whore, bitch, drunk ass, pussy."

Defense counsel then asked witnesses if words like bitch or cunt were appropriate as "shop talk."

[78] Contrary to defense counsel's characterization, an employee in defendant's human resources department stated that a reasonable

She repeatedly questioned plaintiff about whether she reported harassing incidents to supervisors while plaintiff continually testified that the supervisors were standing right next to her during the incidents.[79] When plaintiff testified that a coworker was snidely telling other employees to watch what they were saying or it would be labeled sexual harassment, defense counsel tried to characterize the coworker as being helpful by merely instructing other people about what is appropriate. Regarding an article about men and sperm left near plaintiff's soda can, defense counsel attempted to minimize the incident because the article was in a scientific magazine.

Defense counsel questioned plaintiff about plaintiff's alleged failures to keep abreast of defendant's investigations. Defense counsel also repeatedly alluded to the fact that plaintiff knew who was harassing her, even though plaintiff repeatedly said she did not know for certain and she did not want to falsely accuse someone. Defense counsel argued,

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person would find the cartoons and pictures offensive. Another said he considered the penis photograph to be sexual harassment.

[79] *A*. [The supervisors] had been standing in the group of people with him speaking that way, yes.
Q. And did you at any time ask either of them why they are permitting this individual to address you in such fashion?
A. No, I didn't.
Q. Then, how can you be certain they heard what you heard?
A. Because they were right there.
Q. What do you mean by right there, shoulder-to-shoulder with you?
A. We were all in a group. I mean, they weren't far enough away where they were out of earshot.

"She [plaintiff] thought it was more important to protect whoever it was that was responsible."[80] Regarding plaintiff, defense counsel argued, "There is absolutely nothing wrong with her." Consistent with the strategy that plaintiff was responsible for the continued mistreatment, defense counsel asked witnesses if plaintiff was a "tomboy" and she also questioned whether plaintiff had "put herself in a position of being in a profession that has historically been dominated by men."

During closing argument, defense counsel brought up private incidents relating to plaintiff that occurred over twenty years ago, even though plaintiff did not begin working with defendant until 1992. She argued the only problem plaintiff's coworkers had with plaintiff related to her alcoholism. "They never had a problem with Ms. Gilbert as a female." Defense counsel's theme was to blame the victim. This was demonstrated in a statement she made indicating that plaintiff's "medical records also reflect that she has a tendency to blame everyone else for her problems, rather than look directly at her problems."

The majority criticizes the conduct of plaintiff's counsel; however, a thorough review of the trial transcripts and lengthy closing argument finds sparse objections made by defense counsel and no impropriety justifying a new trial. Regarding statements made by plaintiff's counsel during

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[80] Defendant's records, however, indicate that plaintiff did not know who was responsible for leaving harassing items. For example, defendant's records on October 10, 1994, state, "She [plaintiff] also stated she know [sic] it is a maintenance employee and she can only guest [sic] at this time because she hasn't seen them doing this."

closing argument, he first stated that plaintiff thanked the jury for allowing her to exercise her right as an American citizen to have her day in court. Plaintiff's theme during closing argument was that plaintiff had great fortitude to withstand the harassment. Plaintiff had repeatedly testified that she was not a quitter, she had every right to work at the plant, and she was not going to let them run her out. Plaintiff's counsel referenced the strength of those who were affected by the Holocaust. He also referenced Prometheus and Zeus, and stated that the myth of the eagle pecking at Prometheus's liver for all eternity reminded him of plaintiff's ordeal. He compared plaintiff to Rosa Parks and Arthur Ashe, as well as a dog that was kicked and abused every day. He even referred to plaintiff as a pioneer. When reviewing the closing argument in context, it is obvious that plaintiff's counsel was arguing that plaintiff was courageous and determined. Contrary to the majority's assertion, plaintiff's counsel was no more likening plaintiff to the Holocaust victims than he was likening her to a figure in Greek mythology being pecked by a bird.

Plaintiff's counsel also *appropriately* stated that defendant should be judged just as any *individual* would be judged. And he stated that the jury could not punish defendant; it could only compensate plaintiff for the harm suffered. While plaintiff's counsel did refer to "torture" and "beating plaintiff down," the jury heard weeks of testimony and was aware that no evidence of physical abuse was introduced. Defense counsel obviously did not think the phrases were inflammatory because there was no objection raised. To suggest, as the majority does, that the jury was somehow influenced or confused by these random phrases during closing arguments is insulting to the jurors' intelligence.

The majority's blanket statements about plaintiff's counsel belie the truth of the record. Plaintiff's counsel no more played on the prejudices of the jury because defendant was a German company than he played on the prejudices of the jury because he hoped the jury liked dogs, tennis players, or well-known pioneers such as Lewis and Clark. While plaintiff's counsel's comments are highlighted by the majority, the references were minuscule in the context of the entire trial. The majority hopes that by merely stating that these references were "naked appeals to entice the jury to consider its passions and prejudice," *ante* at 3 n 1, it can magically transform the events that occurred at trial. However, a review of the whole record reveals that the majority's approach misstates the events at trial.

The majority states, "Overreaching, prejudice-baiting rhetoric appears to be a calculated, routine feature of counsel's trial strategy." *Ante* at 33. I do not know if that statement is accurate. But what I do know is that it is not an accurate statement *in this case*. No matter what plaintiff's counsel's *routine* may be, this Court should focus only on the facts before us. An impartial review of those facts indicates the behavior of plaintiff's counsel does not warrant a new trial.

II. EXPERT WITNESS TESTIMONY

I agree with the majority that "MRE 702 has imposed an obligation on the trial court to ensure that any expert testimony admitted at trial is reliable." *Ante* at 36-37. However, I disagree that the trial court erred in failing to conduct its gatekeeper role in this case.

Stephen Hnat, a fact and expert witness called by plaintiff, testified that he is a clinical social worker, which means he is licensed to perform psychotherapy--both group therapy and individual therapy--primarily for people who have substance abuse disorders, or depressive or emotional disorders. He has worked as a clinical social worker since 1981. Among other positions, Mr. Hnat served as staff therapist and the director of cocaine treatment for Ford Hospital-Maplegrove.

During his testimony, Mr. Hnat clarified that he is not a doctor and that he did not complete his Ph.D. Unlike the majority, I do not find any evidence that Mr. Hnat's misstatement that he possessed a master's degree was intentional. Mr. Hnat entered a doctorate program that he did not complete. It is not unreasonable that, twenty years later, he was unclear about whether he had completed the required paperwork to be awarded his master's degree. I also do not find that, in light of Mr. Hnat's other credentials, the misstatement affected the jury verdict. Mr. Hnat detailed a lengthy career that included consulting with the Michigan Department of Transportation, as well as the Detroit Red Wings, Detroit Tigers, Detroit Lions, and the University of Michigan Athletic Department. Mr. Hnat also served as a consultant to the National Institute of Drug Abuse and served on the President's Task Force for a Drug-Free Workplace. He also conducted research over the years and authored an award-winning video used by numerous corporations. Further, he served as an instructor at the Michigan Judicial Institute and as an adjunct professor at the University of Detroit Mercy. During direct examination, plaintiff's counsel and Mr. Hnat were forthcoming about their past working relationship.

Mr. Hnat first treated plaintiff in 1992. He testified that there is a withdrawal period when an alcoholic stops drinking. The withdrawal period depends on the person and how much the person drank, but "if you stop using alcohol very quickly, your body can be, the brain is overstimulated and you can develop some serious life-threatening complications at that time." Mr. Hnat also testified:

> Alcoholism is, you know, is a progressive disease which ultimately is fatal and it's fatal in a number of different ways unless it's arrested but then it's not fatal but the way that alcoholics or people with addiction generally die are associated with overdoses, accidents because of the effect of the drug and the functioning of the environment. More often than not it's a very slow and painful process as the body begins to break down because of the toxic effects of the chemical, so in the case of alcoholics, the process of dying usually involves the development of some very painful medical complications such as pancreatitis or hepatitis or cirrhosis.[81]

He further explained that alcoholism "continues to capture more of the brain's functions so that the person is, you know, the brain, it becomes more and more focused on getting and using the drug."

Unlike the majority, I do not find this testimony "utterly lacking in scientific support." *Ante* at 19. In short, Mr. Hnat's testimony was that plaintiff was an alcoholic. Stress related to

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[81] Medical records listed various medical conditions suffered by plaintiff, including chronic pancreatitis.

the sexual harassment she suffered while employed by defendant caused plaintiff to start drinking again and suffer from depression, which also exacerbated her drinking.[82] As an alcoholic suffering from depression, plaintiff may die from a disease common to alcoholics. Mr. Hnat testified that "for the person who has alcoholism, that kind of stress [from sexual harassment] produces an additional risk not only of emotional distress but of triggering a process of compulsive drug seeking. That the person will, they feel bad, and that sort of natural connection of the brain is I feel bad. I feel like drinking." Medical records signed by various medical professionals indicate that plaintiff suffered "extreme stress in her work environment due to sexual harassment." I do not believe that the trial court abused its discretion in admitting Mr. Hnat's testimony.

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[82] Plaintiff testified:

> It [the harassment] just got worse. And being an alcoholic, sometimes that is the way we cope with things is by going back to the bottle and that is what I did.
>
> * * *
>
> I belief [sic] that the daily abuse that I have been subjected to at work has hindered me greatly in being able to remain sober.

In contrast, defense counsel suggested that plaintiff's depression was not the result of repeated sexual harassment at work, but could have been the result of having to depend on other people for transportation.

III. REMITTITUR

The jury found that plaintiff had been subjected to sexual harassment in violation of the Michigan Civil Rights Act, MCL 37.2101 *et seq.*, and that defendant did not adequately investigate and take prompt and appropriate remedial action. The jury awarded $20 million for mental anguish, physical pain and suffering, fright and shock, denial of social pleasures and enjoyments, embarrassment, humiliation, mortification, shame, anger, chagrin, disappointment, worry, outrage, disability including the loss or impairment of plaintiff's psychological well-being, and the increase in plaintiff's disease of substance abuse arising from an aggravation of a preexisting condition. The jury also awarded $1 million in a trust fund for plaintiff to use for *future medical expenses*; contrary to the majority's assertion, when the jury verdict was read, the jury did not state that this amount was for future earning capacity.

As stated, I believe that the jury's verdict for the plaintiff was amply supported by testimony offered at trial. I also disagree with the majority's statement that "we cannot accept the argument that plaintiff's was the *worst* case of sexual harassment in the history of the country that has resulted in a verdict." *Ante* at 22. Plaintiff does not have to prove that her case was the worst case of sexual harassment in the history of the country to support the verdict. However, the verdict must be properly supported by the evidence and reviewed to determine

> [1] whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; [2] whether the verdict was within the limits of what reasonable minds

> would deem just compensation for the injury sustained; [3] whether the amount actually awarded is comparable to awards in similar cases within the state and in other jurisdictions. [*Palenkas v Beaumont Hosp*, 432 Mich. 527, 532; 443 N.W.2d 354 (1989).]

On the basis of the evidence introduced at trial and awards in other sexual harassment cases, as detailed by the majority, I believe that the jury award in this case is too great. *See id.* at 538-540; *Precopio v Detroit*, 415 Mich. 457, 479; 330 N.W.2d 802 (1982). While defendant's conduct was reprehensible and plaintiff's suffering indisputable, a review of jury awards in other sexual harassment cases indicates that the jury's award in this case was inappropriate. While a review of other awards cannot serve as an exact indicator and circumstances may certainly justify higher awards than those granted by other juries, the disparity between this award and others involving a single plaintiff indicates that it is not analogous.

I stress, however, that I do not believe the matter should be remanded for remittitur on the basis of any misconduct on the part of plaintiff's counsel. The excessively large verdict in plaintiff's favor is attributable solely to the conduct of defendant and defense counsel.[83] In an ironic exchange during

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[83] In a telling exchange, an employee of the *human resources department* attempted to dismiss plaintiff's complaints of sexual harassment.

> *Q*. She did actually complain to you that she had been the victim of harassment, didn't she?
> *A*. Complained no. It was more upon [sic] a conversation.
> * * *

the trial, plaintiff's counsel actually predicted the outcome of the case after defense counsel requested a jury instruction regarding plaintiff's lack of mitigation. Defense counsel stated that plaintiff was causing her own medical problems and "could have ameliorated the later incidents [of sexual harassment] which could have harmed her." Plaintiff's counsel stated that defense counsel's argument that plaintiff is responsible for her damages

> is going to pump up the damages in this case when they start blaming [plaintiff]. So, I want the record to reflect I am acceding to this on behalf of my client because it is my firm belief that this would increase the amount of damages that is awarded to my client, rather than decrease them. . . . And I just want to make a record. If we get an astronomical verdict and the Defendant comes back and asks for a remittur [sic], Judge, I want the record to reflect that the Defendant is requesting an instruction that I think would have the effect of further angering the jury and increasing the damages.

> *A*. Like a factfinding thing, like she wants to know what she could do, what avenues she could take, that sort of thing.
> *Q*. So she was asking you for advice on what she should do?
> *A*. Yes.

While I find plaintiff's counsel's prescience impressive, the excessively high verdict cannot be allowed to stand merely because plaintiff's counsel made a record of defense counsel's woeful error in strategy. Therefore, I would remand this matter to the trial court for remittitur.

IV. CONCLUSION

Defendant's trial strategy was to question, and minimize, the harassment experienced by plaintiff and blame plaintiff for not being more active in seeking to stop the harassment. This strategy was chosen by defendant and rejected by the jury. Conduct by plaintiff's counsel that is now classified as unacceptable was frequently not objected to by defendant. I do not believe that this Court should now step in to help defendant correct its errors in judgment. Therefore, I respectfully dissent.

Michael F. Cavanagh

Elizabeth A. Weaver

Marilyn Kelly

APPENDIX C

SUPREME COURT OF MICHIGAN

No. 122457

[Decided October 30, 2003]

LINDA M. GILBERT,
Plaintiff-Appellee,

v.

DAIMLERCHRYSLER CORPORATION,
Defendant-Appellant.

COA: 227392. Wayne CC: 94-409216-NH.
Gilbert v. Daimler-Chrysler Corp.,
469 Mich. 880, 669 N.W.2d 265,
2003 Mich. LEXIS 2039 (2003)

JUDGES: Kelly, J., not participating in the decision regarding this motion for reconsideration. Weaver, J. (not participating in part and voting to grant reconsideration in part).

OPINION

On order of the Court, the motion for reconsideration of this Court's order of September 17, 2003 is considered, and

it is DENIED, because it does not appear that the order was entered erroneously.

Kelly, J., not participating in the decision regarding this motion for reconsideration.

Weaver, J. (*not participating in part and voting to grant reconsideration in part*), states:

Plaintiff moves for reconsideration of the Court's September 17, 2003, order[1] denying plaintiff's motion for recusal and for an evidentiary hearing regarding the participation of Chief Justice Corrigan and Justices Taylor, Young, and Markman in *Gilbert v DaimlerChrysler Corp.*[2] Plaintiff does not seek reconsideration of my decision not to recuse myself from the case.[3]

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[1] *Gilbert v Daimler-Chrysler Corp*, 469 Mich. 880, 669 N.W.2d 265 (2003).

[2] On April 8, 2003, this Court entered an order granting defendant's application for leave to appeal. *Gilbert v Daimler-Chrysler Corp*, 468 Mich. 883, 661 N.W.2d 232 (2003).

[3] Plaintiff initially filed a motion for the recusal of Chief Justice Corrigan, myself, and Justices Taylor, Young, and Markman from *Gilbert v DaimlerChrysler*, and requested an evidentiary hearing on the motion for recusals. On September 17, 2003, an order was entered on plaintiff's motion. In that order, Chief Justice Corrigan and Justices Cavanagh, Taylor, Young, and Markman voted to deny plaintiff's motion with regard to all the challenged justices. Justice Kelly, who was not challenged by the plaintiff, did not participate in the motion. I denied the motion to recuse myself and did not participate in the motion regarding whether the other justices should recuse themselves. I also explained that given the nature of

Plaintiff's reconsideration motion presents two alternative requests. Plaintiff asks that the whole Court convene to decide the motion for reconsideration regarding the denial of the motion for recusal and the denial of an evidentiary hearing regarding the participation of Chief Justice Corrigan and Justices Taylor, Young, and Markman.

Alternatively, plaintiff requests that the Court employ the procedure set forth in MCR 2.003(C)(3) to review the decisions of Chief Justice Corrigan and Justices Taylor, Young, and Markman not to disqualify themselves from this case. Specifically, plaintiff requests that the decision of Chief Justice Corrigan to not recuse herself be reviewed by a judge assigned by the state court administrator and that the decisions of Justices Taylor, Young, and Markman be reviewed by Chief Justice Corrigan or a judge assigned by the state court administrator.

I do not participate in the reconsideration request regarding whether the other justices should have recused themselves, whether there should be an evidentiary hearing regarding their participation, or whether their decisions not to recuse themselves and not to hold an evidentiary hearing on the question of the participation should be reversed on reconsideration.

I would grant plaintiff's motion for reconsideration to address the proper procedure for the review of a judge's decision not to recuse himself or herself from a case. Pursuant

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plaintiff's allegations regarding her request for my recusal, there was no need for an evidentiary hearing for me to decide whether to participate.

to MCR 2.003, the challenged judge decides the motion asking for his or her disqualification. If the motion is denied and a party requests review of the denial, pursuant to MCR 2.003(C)(3), the chief judge or a judge appointed by the state court administrator then reviews de novo the judge's decision not to recuse himself or herself.

A

Reconsideration of Motion for Recusals

In the September 17, 2003, order I decided only plaintiff's motion asking that I recuse myself and did not participate in the motion regarding whether the other justices should recuse themselves. Justice Kelly, who was not challenged by the plaintiff, did not participate in the motion. Plaintiff argues that the whole Court--including Justice Kelly and myself--should convene to decide the motion to recuse Chief Justice Corrigan and Justices Taylor, Young, and Markman and to have an evidentiary hearing regarding each justice's participation in this case. MCR 2.003(C)(3) states in pertinent part, however, that the ". . . challenged judge shall decide the motion."

As I explained in my previous statement in this matter, pursuant to MCR 2.003(C)(3), it is the duty of each challenged judge to make his or her own decision on a motion asking for the judge's disqualification in a case. Thus, I do not participate in the reconsideration regarding the denial of the motion regarding Chief Justice Corrigan and Justices Taylor, Young, and Markman.

Plaintiff contends that the Supreme Court need not comply with MCR 2.003(C)(3). This argument is without merit. MCR 2.001 governs when the rules in chapter 2 of the court rules,

including MCR 2.003, apply to a court. MCR 2.001 provides:

> The rules in this chapter [which include MCR 2.003] govern procedure in all civil proceedings in all courts established by the constitution and laws of the State of Michigan, except where the limited jurisdiction of a court makes a rule inherently inapplicable or where a rule applicable to a specific court or a specific type of proceeding provides a different procedure.

The Michigan Supreme Court is a court established by the Constitution of the state of Michigan; it is not a court of limited jurisdiction so that MCR 2.003 would be "inherently inapplicable." Nor is there a rule on motions for recusal that provides a different procedure applicable specifically to the Supreme Court. Thus, until such time as MCR 2.003 is revised to include a different procedure that would specifically apply to the Supreme Court,[4] it is appropriate for each justice to follow the procedure outlined in MCR 2.003(C)(3) when deciding motions for his or her recusal.

Finally, plaintiff's argument that the procedure detailed in MCR 2.003(C)(3) does not apply to the Supreme Court because the court rule uses the term "judge" rather than "justice" must fail. A justice is a judge. Black's Law

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[4] In *In re JK*, 468 Mich. 202, 220-221; 661 N.W.2d 216 (2003), I proposed a court rule requiring that when the issue of a justice's disqualification is raised, the justice should publish in the record of the case the reasons for his or her decision to participate or not participate in the case. Because I believe that this procedure would better inform the public and is in no way precluded by any court rule, I have followed this procedure.

Dictionary defines a "justice" as "A judge, esp. of an appellate court or a court of last resort."[5] Therefore, use of the term "judge" does not preclude this Court from following the procedures articulated in MCR 2.003.

B

Procedure to Review Denials of Request for Recusals

Because MCR 2.003 is applicable, I would grant plaintiff's alternative request for the Court to address and to follow the procedure set forth in MCR 2.003(C)(3) for the review of a judge's decision not to recuse himself or herself from a case. Pursuant to MCR 2.003(C)(3), when a motion to recuse a judge is denied and a party requests review of the denial, the chief judge or a judge appointed by the state court administrator reviews the decision. MCR 2.003(C)(3) provides:

> Ruling. The challenged judge shall decide the motion. *If the challenged judge denies the motion,*
>
> (a) in a court having two or more judges, *on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo;*
>
> (b) in a single-judge court, or *if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge,*

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[5] Black's Law Dictionary (7th ed).

> *who shall decide the motion de novo.* [Emphasis added.]

The procedure in MCR 2.003(C)(3) for review of the denial of the motion for recusal should be followed in this case, as plaintiff has now requested.

This Court has recognized that failure to refer the motion to disqualify to the chief judge on the request of a party is wrong and improper. *In re Bradfield,* 465 Mich. 1309, 1311, 638 N.W.2d 107 (2002). The requirement that the motion be referred to the chief judge is not discretionary. *In re Smith),* 244 Mich. App. 153, 160-161, 624 N.W.2d 504 (2000).

Pursuant to MCR 2.003(C)(3), Chief Justice Corrigan's decision to deny the motion for recusal with regard to herself should be reviewed de novo by a judge assigned by the state court administrator. Justices Taylor, Young, and Markman's decisions to deny plaintiff's motion concerning themselves should be reviewed de novo either by Chief Justice Corrigan or by a judge appointed by the state court administrator.

Conclusion

I do not participate in the reconsideration request regarding whether the other justices should have recused themselves, whether there should be an evidentiary hearing regarding their participation, or whether their decisions not to recuse themselves and not to hold an evidentiary hearing on the question of their participation should be reversed on reconsideration.

I would grant plaintiff's motion for reconsideration to address the proper procedure for the review of a judge's

decision not to recuse himself or herself from a case. Pursuant to MCR 2.003, the challenged judge decides the motion asking for his or her disqualification. If the motion is denied and a party requests review of the denial, pursuant to MCR 2.003(C)(3) the chief judge or a judge appointed by the state court administrator then reviews de novo the judge's decision not to recuse himself or herself from the case. Thus, pursuant to MCR 2.003(C)(3), Chief Justice Corrigan's decision to deny the motion for recusal regarding herself should be reviewed de novo by a judge assigned by the state court administrator. Justices Taylor, Young, and Markman's decisions to deny plaintiff's motion relating to themselves should be reviewed de novo either by Chief Justice Corrigan or by a judge appointed by the state court administrator.

APPENDIX D

SUPREME COURT OF MICHIGAN

No. 122457

[Decided September 17, 2003]

LINDA M. GLIBERT,
Plaintiff-Appellee,

v.

DAIMLERCHRYSLER CORPORATION,
Defendant-Appellant.

JUDGES: Kelly, J., not participating in the decision regarding this motion. Weaver, J., not participating in the decision regarding the motion to recuse Chief Justice Corrigan and Justices Taylor, Young and Markman, denies the motion to recuse herself.

OPINION

On order of the Court, the motion for recusal and for an evidentiary hearing is considered, and it is DENIED.

Kelly, J., not participating in the decision regarding this motion.

Weaver, J., not participating in the decision regarding the motion to recuse Chief Justice Corrigan and Justices Taylor, Young and Markman, denies the motion to recuse herself and states:

> On April 8, 2003, this Court entered an order granting defendant's application for leave to appeal.[1] Subsequently, plaintiff filed a motion for recusal by Chief Justice Corrigan and Justices Weaver, Taylor, Young, and Markman from hearing this appeal. Plaintiff also asks that there be an evidentiary hearing on the motion for recusals.

A challenged judge decides the motion asking for his disqualification. MCR 2.003(C)(1), (3). Therefore, even though the plaintiff's motion also asks for recusal by Chief Justice Corrigan and Justices Taylor, Young and Markman, the only issue before me is whether I should recuse myself

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[1] *Gilbert v Daimler-Chrysler Corp*, 468 Mich. 883, 661 N.W.2d 232 (2003).

from participating in this appeal.[2] I do not decide whether my colleagues should recuse themselves or not.

As explained below, given the nature of the allegations plaintiff makes supporting the request for my recusal, there is no need for an evidentiary hearing for me to decide whether to participate in this matter. I deny plaintiff's motion requesting that I recuse myself from this appeal.

I

In requesting my recusal from this appeal, plaintiff asserts only that the Michigan Chamber of Commerce, which filed a brief as amicus in this case, contributed to my campaign for reelection to the Michigan Supreme Court in 2002 and aired advertisements advocating my reelection.[3]

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[2] In my statement of disqualification in *In re JK*, 468 Mich. 202; 661 N.W.2d 216 (2003), I proposed for public comment amendments to Michigan Court Rule 2.003. For the full text of my proposed amendments, *see* Appendix B. These amendments would provide that in a case such as this, when the issue of disqualification is raised, a justice should publish in the record of the case the reasons for his or her decision to participate or not participate in the case.

I continue to believe that publishing the reasons for one's decision on whether or not to participate in a case would better inform the public. I have therefore followed this procedure and placed my response to plaintiff's motion for recusal on the record.

[3] *See* Appendix A for the full text of plaintiff's allegations requesting my recusal.

While plaintiff alleges that Chief Justice Corrigan and Justices Taylor, Young and Markman have made statements about plaintiff's attorney, Geoffrey Fieger, and the issues in this case demonstrating bias or prejudice in this appeal, plaintiff does not allege that I have made any such statements. For the record, I note that I have not made or caused to be published any statements about any of the parties, their attorneys, the amicus, or the issues in this case that would raise the issue of bias or prejudice on my part.

In 2002, the Michigan Chamber of Commerce made a contribution of $15,055 directly to my reelection campaign.[4] The Chamber also spent $ 840,000 on advertisements supporting the reelection of Justice Young and myself that it created and aired without my knowledge or participation.[5] In the interest of complete disclosure, I also note that my reelection campaign records show that it received contributions of $ 200 from plaintiff's attorney, Geoffrey Fieger; $ 2,000 from DaimlerChrysler's political action committee (PAC); $ 250 from DaimlerChrysler's assistant general counsel, Steven Hantler; $ 375 each from DaimlerChrysler's attorneys Elizabeth Hardy and Thomas

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[4] This amount was less than half the maximum limit of $34,000. *Special Interests v Public Values: Funding Michigan Supreme Court Campaigns, 1994-2000,* The National Institute on Money In State Politics, <http://www.followthemoney.org/reports/mi/20020129/MI.phtml>.

[5] *A Citizen's Guide to Michigan Campaign Finance, 2002,* Michigan Campaign Finance Network, The National Institute on Money In State Politics. <http://www.followthemoney.org/reports/mi/20020129/MI.phtml>

Kienbaum; and $ 500 from retired Justice Patricia Boyle, of counsel for DaimlerChrysler in this case.

Plaintiff essentially asserts that the Chamber's contributions to my reelection campaign and the advertisements that the Chamber produced and aired advocating my reelection are inherent cause for my recusal from the case. I disagree. Under the current system for selection of Michigan Supreme Court justices, the rules clearly allow both the contributions that were made to my campaign and the advertisements that the Chamber created and aired supporting my reelection.

The question, given the current election system, is not whether amicus made contributions to my reelection campaign or created and aired advertisements supporting my reelection, but whether those contributions and that support would influence my judgment in this appeal. A judge is disqualified from participating in a case when the judge cannot impartially hear the case, including when the judge is personally biased or prejudiced for or against a party or attorney. MCR 2.003(B). The contribution to my 2002 reelection campaign made by amicus, Michigan Chamber of Commerce, and the advertisements that the Chamber produced and aired have not caused me to be influenced for or against either party. None of the contributions to my reelection campaign nor any of the advertisements aired supporting my reelection have even the remotest effect on my decisions and judgment as a justice of this Court.

I have given careful consideration to plaintiff's request that I recuse myself from participating in this case. Because I am neither biased nor prejudiced for or against anyone in the case I deny plaintiff's motion requesting that I recuse myself

from participation in this appeal. It would be a disservice to the public that elected me if I failed to participate in a case in which I am eligible to serve when I have no bias or prejudice that would prevent me from doing so.

II

Plaintiff also asks that there be an evidentiary hearing on the motion for recusal. I would not be opposed to holding an evidentiary hearing on plaintiff's motion, were there allegations against me that required fact-finding. But there are none. Given the nature of the allegations supporting plaintiff's request for my recusal, such a hearing is not necessary for me to decide whether I should participate in this case. Plaintiff's allegations that amicus, the Michigan Chamber of Commerce, contributed to my campaign for reelection and aired advertisements supporting my reelection are well-established on the public record and are not in dispute. Thus, an evidentiary hearing would not provide any additional information to assist me in deciding whether to participate in the case.

III

Plaintiff's motion for recusal presents an opportunity to address Michigan's current system of selecting justices, which combines statewide elections and appointments by the Governor to fill vacancies. A full term of office is eight years, and a justice may run for reelection. When a justice leaves office before his or her term expires, the Governor appoints a new justice to fill the vacancy. The Governor's power of appointment to fill vacancies is absolute and unchecked. The newly appointed justice must then run in the next election for the remainder of the predecessor's term. Because the terms of

justices are staggered, and because justices appointed to fill vacancies must run for the remainder of the term, there is a statewide election for Supreme Court every two years.

Increasingly large sums of money have been raised for and spent by the candidates' campaigns and/or independent political action committees. During the years from 1994 to 2000, the amounts contributed to the candidates nominated by the two major parties and the independent expenditures by the political parties and political action committees have risen sharply. The total amount spent on Supreme Court elections has gone from $1,339,842 in 1994 to at least $16 million estimated in 2000 -- a 12-fold increase in just 6 years.[6]

Michigan's method of selecting Supreme Court justices has rightly come under intense scrutiny since the 2000 election -- the most expensive and rancorous for the judiciary in state history. In my opinion, the escalating cost and rhetoric of Michigan Supreme Court justice campaigns have not served to better inform the electorate regarding the qualifications of the candidates. Spending $16 million or more in a Supreme Court campaign is unseemly, wasteful, and

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[6] These figures are taken from *Special Interests v Public Values: Funding Michigan Supreme Court Campaigns, 1994-2000,* Michigan Campaign Finance Network and Sanchez, Samantha, *Campaign Contributions and the Michigan Supreme Court,* The National Institute on Money In State Politics, <http://www.followthemoney.org/reports/mi/20020129/MI.phtml>. *See* Appendix C for the campaign contributions for the 1994, 1996, 1998, 2000, and 2002 campaigns. The total amount spent in the elections cannot be known exactly because advertisements run in opposition to various Supreme Court candidates are not regulated by MCL 169.206(2).

ultimately damaging to the public's trust and confidence in the Supreme Court, and therefore, the judiciary. The judiciary cannot afford to be perceived by the public as "bought and paid for." A system that allows and encourages the expenditure of huge amounts of money on Supreme Court elections needs reconsideration.

I have been elected and reelected to the judicial bench seven times: three times to the probate court, twice to the Court of Appeals, and twice to the Supreme Court. While I find the challenges of the campaign process invigorating, my campaign experiences have revealed the inherent problems in our current system. Indeed, in each of my campaigns I emphasized the importance of voting the "nonpartisan ballot," because so many citizens I met were unfamiliar with judicial candidates and even the fact that judges and justices are both appointed and elected. Over two years ago when I was Chief Justice, I proposed for exploration a modified version of the federal plan for selecting Michigan Supreme Court justices. I continue to develop and consider plans for an alternative selection system for Michigan Supreme Court justices.

To ensure the independence of the Court and to better inform the public about the process, it is time to initiate a public dialogue regarding the method by which Michigan Supreme Court justices are selected. A first step in this process should be the creation of a commission to study the possible methods of selecting Michigan Supreme Court justices. A commission would generate ideas that can improve our current system and educate the public about options. I urge the Governor, the Legislature or the Michigan Supreme Court, or any combination of these branches of government, to form a commission to study and report on the important

issue of the selection of Michigan Supreme Court justices, which is vital to the well-being of the judiciary.

APPENDIX A:
The Full Text of the Allegations Requesting My Removal

14. In the fall of 2002, the Michigan Chamber of Commerce provided substantial benefit to the campaigns of Justices Young and Weaver, publicly airing advertisements which advocated the election of these Justices.

15. These advertisements and campaign benefits were made about the same time as the Michigan Chamber of Commerce filed its *Amicus Curiae* Brief in support of its member, Defendant Daimler Chrysler, in this case.

16. In short, the Michigan Chamber, which had no prior involvement in this case, filed its Amicus Brief in support of Defendant Daimler Chrysler and, at about the same time, publicly financed the campaigns of Justices Young and Weaver.

17. There is no indication in the Order of April 8, 2003 that Justices Young or Weaver recused themselves from considering the requests of their campaign benefactor, the Michigan Chamber of Commerce.

18. Plaintiff respectfully submits that Justices Young and Weaver should recuse themselves from further involvement in this appeal:

a. For these Justices to participate in this appeal on its substantive merits, with the involvement of the Chamber,

their principal campaign contributor, would minimally present the appearance of impropriety;

b. The payments for the benefit of these Justices give rise to bias or prejudice favorable to the Chamber and its member, Defendant Daimler Chrysler;

c. For these Justices to participate would present a probability of actual bias that is too high to be constitutionally tolerable.

* * *

27. This is the first case known to the undersigned in which the Michigan Chamber of Commerce has appeared as *Amicus Curiae* after making the campaign contributions and payments for the 2000 and 2002 campaigns referred to above.

APPENDIX B:
Proposed Amendments to Michigan Court Rule 2.003

(C)(5)*Disqualification of a justice.* If a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice or another justice, the challenged justice shall decide the issue and publish in the record of the case his or her reasons for the decision to participate or not.

(D)(2)*Procedure for a justice.* If it appears that there may be grounds or possible grounds for disqualification, the justice may have the clerk of the supreme court send the parties the justice's written explanation of the grounds or possible grounds for disqualification, and ask the parties and their attorneys to consider whether to waive any disqualification.

If, following disclosure of any grounds or possible grounds for disqualification other than personal bias or prejudice concerning a party, the parties all notify the clerk of the supreme court in writing that the justice should not be disqualified, and the justice is then willing to participate, the justice may participate in the case.

Appendix C: Contributions and Independent Expenditures in Supreme Court Elections, 1994-2002

1994 Supreme Court Election

Candidate	Amount contributed to campaign	Independent Expenditures on behalf of candidate
Shelton	$ 519,901	$ 16,281
Mallett	$ 374,101	$ 34,387
Griffin	$ 198,178	$ 0
Weaver	$ 196,995	$ 0

1996 Supreme Court Election

Candidate	Amount contributed to campaign	Independent Expenditures on behalf of candidate
Gage	$ 723,570	$ 477,962
Murphy	$ 699,354	$ 367,924
Kelly	$ 553,274	$ 123,649
Brickley	$ 228,977	$ 223,697

1998 Supreme Court Election

Candidate	Amount contributed to campaign	Independent Expenditures on behalf of candidate
Corrigan	$ 1,033,339	$ 30,780
Taylor	$ 986,566	$ 6,572
Borman	$ 663,183	$ 19,256
Youngblood	$ 592,297	$ 6,890
Cavanagh	$ 255,072	$ 6,890
Collins	$ 202,163	$ 6,572

2000 Supreme Court Election

Candidate	Amount contributed to campaign	Independent Expenditures on behalf of candidate
Taylor	$ 1,332,975	$ 522,627
Young	$ 1,292,192	$ 538,885
Markman	$ 1,244,502	$ 497,073
Robinson	$ 1,195,683	$ 9,748
Thomas	$ 1,008,420	$ 9,748
Fitzgerald	$ 750,539	$ 9,748

2002 Supreme Court Election

Candidate	Amount contributed to campaign	Independent Expenditures on behalf of candidate
Young	$ 622,413	$ 10,842
Weaver	$ 280,440	$ 1,958
Drake	$ 44,025	$ 7,797
Brennan	$ 11,549	$ 10,093

These figures are taken from Special Interests v Public Values: Funding Michigan Supreme Court Campaigns, 1994-2000, Michigan Campaign Finance Network; A Citizen's Guide to Michigan Campaign Finance--2002, Michigan Campaign Finance Network; and Sanchez, Samantha, Campaign Contributions and the Michigan Supreme Court, The National Institute on Money In State Politics, <http://www.followthemoney.org/reports/mi/20020129/MI.phtml>.

Independent expenditures are expenditures made by the political parties and political action committees on behalf of a candidate.

APPENDIX E

SUPREME COURT OF MICHIGAN

No. 122457

[Decided April 8, 2003]

LINDA M. GLIBERT,
Plaintiff-Appellee,

v.

DAIMLERCHRYSLER CORPORATION,
Defendant-Appellant.

COA: 227392. Wayne CC: 94-409216-NH.
Gilbert v. Daimler-Chrysler Corp.,
2002 Mich. App. LEXIS 1168
(Mich. Ct. App., July 30, 2002)

DISPOSITION: Leave to appeal granted; motions to file briefs amicus curiae granted.

OPINION

On order of the Court, the application for leave to appeal from the July 30, 2002 decision of the Court of Appeals is considered, and it is GRANTED. The motions to file briefs amicus curiae by the Michigan Chamber of Commerce and by

the United States Chamber of Commerce are also GRANTED. Other persons or groups interested in the determination of the questions in this case may move the Court for permission to file briefs amicus curiae.

APPENDIX F

COURT OF APPEALS OF MICHIGAN

No. 227392

[Decided July 30, 2002]

LINDA M. GLIBERT,
Plaintiff-Appellee,

v.

DAIMLERCHRYSLER CORP.,
Defendant-Appellant.

Wayne Circuit Court. LC No. 94-409216-NH.

JUDGES: Before: Whitbeck, C. J., and Fitzgerald and Markey, JJ.

OPINION

A jury awarded plaintiff Linda M. Gilbert $21 million for her claim that defendant DaimlerChrysler, Inc.,[1] violated the

[1] In order to be consistent with the majority of testimony and documentary evidence presented in this case, we refer to defendant as Chrysler.

Michigan Civil Rights Act (CRA), MCL 37.2102 *et seq.*, when its agents, some of Gilbert's coworkers and supervisors, sexually harassed her for more than seven years. Chrysler now appeals as of right from the trial court's order denying its motion for an evidentiary hearing, judgment not withstanding the verdict (JNOV), a new trial, and remittitur. We affirm.

I. Basic Facts And Procedural History

Following her graduation from high school in 1977, Gilbert held jobs at McDonald's and Comerica Bank before attempting to obtain a better job with Blue Cross and Blue Shield of Michigan. When the job with Blue Cross did not materialize, Gilbert decided to become a millwright. Millwrights are skilled tradespeople who work mainly with metals, installing, maintaining, and repairing machinery. This is heavy, dirty, and sometimes dangerous work, which interested Gilbert because of the combination of technical knowledge and athletic skills it requires. In the automobile industry, millwrights are considered among the elite skilled trades because they are responsible for keeping the assembly line moving. In 1986, Gilbert applied to the Millwrights Institute of Technology, where she was accepted and began her four-year millwright apprenticeship. In 1990, Gilbert became a journeyman millwright, having finished the apprenticeship and the many hours of work it required. She spent her first two years as a journeyman working as an independent contractor through her union.

Because of layoffs common to the trade, Gilbert worked very little during fall 1991 and winter 1992. At the same time, Gilbert, who had been abused as a child and had a history of alcoholism and cocaine use, began having personal problems. While details of this period in her life are not

particularly clear, she was arrested for drunk driving and was involved in an altercation at a bar around this time. In early 1992, Gilbert sought treatment for her substance abuse problems from Steven Hnat, a psychiatric social worker who specializes in treating people with substance abuse problems. According to Hnat's evaluation, Gilbert had a substance abuse problem and the depression she was experiencing was a symptom of that substance abuse, not a separate condition. Despite Gilbert's history of abuse as a child and poor family support, Hnat thought that Gilbert was a resilient and motivated person with a good prognosis for recovery, in part because she had initiated treatment voluntarily. By the end of February or the beginning of March 1992, Hnat believed that Gilbert was clean and sober.

In March 1992, Chrysler hired Gilbert to work at its new Jefferson North Assembly Plant. Gilbert was the first female millwright in the plant; in fact, she was the only female skilled tradesperson for the first 1 ½ years she worked at the plant, and the only female millwright for her first two years there. According to Gilbert, her male coworkers immediately started harassing her because she was a woman. Gilbert spent her very first day working for Chrysler in training with other millwrights. One millwright remarked that they had finally been assigned a "bitch," and another made a comment suggesting that she should wear a dress to work and he would hold a ladder for her to climb so that he could look up her skirt.

These comments continued in the plant itself, where Gilbert was first assigned to work in the core assembly area on the second shift. In comments made directly to her, and made in reference to her among the men, the male millwrights, and some of her supervisors, called Gilbert

"bitch," "whore," "cunt," "asshole," often adding "fucking" to these epithets.[2] Gilbert hoped that the male millwrights would accept her, or at least leave her alone, once they saw how competent she was; it is undisputed that Gilbert is skilled in her profession. Though she was friendly with a few other people in different trades, the millwrights did not change their response to her. The journeymen millwrights refused to be partnered with Gilbert, which left her to be partnered with apprentices. Gilbert did not mind working with apprentices generally, but she asked to be assigned to a journeyman millwright to benefit from his experience at Chrysler, noting that apprentices would also benefit from working with other experienced journeymen. Despite never formally declining to work with apprentices, Gilbert felt that always being assigned to work with apprentices forced her to assume a greater portion of the work because apprentices were not always able to help when dealing with a problem. On occasion, she had to fix urgent problems by herself, and then explain to the apprentice what she had done.

Though millwrights must work in teams or small groups to perform certain types of work, some of the male millwrights refused to acknowledge Gilbert. On one occasion, a male millwright would not accept the tool that she tried to hand him until a supervisor made a comment. Despite the danger of trying to perform some repairs without assistance, some male millwrights would go to sleep or leave the area when they were supposed to help her. Two millwrights in particular, Jack Nigoshian and Gerry Ernat, disliked Gilbert, and on at least one occasion tried to get her in trouble by

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[2] Throughout this opinion, we use very explicit language without resort to euphemisms or deletions. We do so advisedly.

reporting to her supervisor that she was absent from her work area when she was actually there. Nigoshian and Gilbert also engaged in a very loud and public fight with each other at work once. For a two or three week period in her first year at Chrysler, unidentified individuals left pallets or other items in front of her large tool locker to block her from getting her tools, which she reported to her direct supervisor. The male apprentices working with her also received verbal harassment, with some millwrights suggesting that Gilbert was performing sexual favors for them.

During this first year of work, Gilbert said, she felt the stress of her working conditions even though she had made very good progress with Hnat. Her depression abated, but Gilbert had what Hnat deemed a "slip" in July 1992, when Gilbert was again arrested for drunk driving. Gilbert said that she felt the need to numb her emotions regarding her work environment and the constant harassment she experienced this slip to him and sought inpatient treatment at Sacred Heart Hospital in October 1992. Hnat thought that working remained an important component of Gilbert's recovery because it minimized her exposure to drinking and gave her something on which to focus, though working twelve hours a day, seven days a week was taxing on Gilbert. Additionally, he observed, Gilbert's success at work was tied to her recovery because of her strong identity as a millwright, her work ethic, and determination not to be forced to leave.

By 1993, one or more unidentified individuals at Chrysler had begun to leave lewd cartoons for Gilbert, sometimes posting them around the plant before leaving them for her to see. On May 22, 1993, Gilbert went to her tool box to retrieve a grinder, but found that someone had taken it. In searching through her toolbox drawers for the grinder, Gilbert

discovered a cartoon entitled "Pecker Wrestling." In the cartoon, three men are watching a fourth man, who is sitting on a table with his pants around his ankles. A woman in the cartoon is grasping the seated man's penis and, from the expression on her face, appears to be exerting some effort to "wrestle" with his penis. A second woman is observing the action. Though difficult to discern from the photocopies in the record, the name "Linda" is written on the cartoon with an arrow to the woman who is "wrestling," the name "Bill Barr" - the name of a welder or millwright who worked with Gilbert - is written across the chest of the man seated on the table. Names of three other millwrights who worked with Gilbert and arrows pointing to the three other men in the cartoon are also visible. There is a question mark over the second woman in the cartoon.

Gilbert reported this incident to her supervisor, Harry Pilon, and in writing to Chrysler management, providing management with a copy of the cartoon.[3] She noted that she thought the cartoon was "obscene," citing the names written on the cartoon as names of people with whom she worked. As she saw it, the woman named "Linda" in the cartoon was "bare-breasted and about to perform fellatio." Gilbert stated that she was "extremely insulted and degraded. The insinuation that this happened between" her and a man with whom she worked "everyday" was" humiliating." Gilbert did not mention any earlier incidents of sexual harassment in her written report.

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[3] The record suggests that one of Gilbert's acquaintances may have seen her crying about the cartoon, and that acquaintance may have taken the cartoon to Pilon. In any event, Pilon directly knew of the cartoon.

Two days later, Frank Battaglia, Sr., an employee in Chrysler's human resources department, discussed the situation with Pilon, Jerry Heikkila, who was Gilbert's union steward, Joe Christman, who was the area coordinator, and Dave Standen, who was the shift operations manager essentially in charge of the workforce in the entire plant. They agreed to talk to all thirty-six millwrights in the core area to explain that the matter was serious and to inform them of Chrysler's sexual harassment policy. Christman and Pilon apologized to Gilbert about the incident and reassured her that Chrysler did not condone this conduct. Though a memorandum indicates that Battaglia and others carried out their intentions to speak with the other millwrights, Gilbert said that no such thing happened. In fact, she said, she found a copy of Chrysler's sexual harassment policy and gave it to some of the other workers.

After Gilbert reported the wrestling cartoon to management, the other millwrights started making hushing noises in her presence and calling her a "snitch." About a week and a half after finding the wrestling cartoon, on June 5, 1993, Gilbert went to her toolbox, only to find that someone had taped a Polaroid photograph of male genitalia to the top of it. She reported this incident to Pilon and Battaglia. Battaglia spoke with Gilbert and Pilon about the Polaroid, but did not separately investigate it, partly because that was not his responsibility and partly because, he later claimed, the investigation into the wrestling cartoon was still underway. Chrysler never determined who had left this cartoon or photograph.

Battaglia and Pilon decided that the best remedy to the problem would be to transfer Gilbert. When Gilbert consented, Chrysler assigned her to the third shift in the paint

shop. Though a more favorable shift, this was not a favorable assignment because the paint shop had noxious fumes, which was of particular concern to Gilbert, an asthmatic. No one alerted Gilbert's supervisors in the paint shop that she was being transferred because of the sexual harassment that had occurred in the core area.

Gilbert apparently remained clean and sober until July or August 1993. Hnat, who continued to treat her, thought this was extraordinary given the pressure Gilbert had been under in June 1993, when Gilbert reported that her union representative was pressuring her to drop her complaint and the sexual harassment had continued. Gilbert, however, had developed a major depressive disorder, which was different from the depression symptomatic of alcoholism that Hnat had seen in Gilbert at the beginning of her treatment. This major depressive disorder was permanent, had affected Gilbert's mood, ability to move, articulate, think, and function. But Gilbert was still determined to prove that she could persevere at work, refusing to take time away from work even when she injured her back, fearing that she would be seen as weak.

Gilbert relapsed into alcoholism at the end of summer 1993, and her psychiatric situation had worsened by September 1993. As of November 1993, Gilbert was bingeing on alcohol after work. Throughout this time, though he was aware of Gilbert's other personal problems, Hnat remained convinced that the sexual harassment she was experiencing at work was the primary reason why she turned to alcohol. With her alcoholism spiraling out of control, Gilbert admitted herself to Sacred Heart Hospital in November 1993. This hospitalization may have coincided with her attempt to commit suicide by cutting her arm. Her Sacred Heart Hospital

records noted that sexual harassment at work remained her greatest risk factor for future relapses.

Sacred Heart discharged Gilbert in December 1993. She remained sober for a few months. Hnat last saw her in January 1994. In March 1994, close to her second-year anniversary with Chrysler, Gilbert sued Chrysler for discrimination in the form of sexual harassment, as well as under a number of other theories. Though the chronology of events during this time is unclear, Gilbert claimed to continue to experience almost daily harassment even after filing suit. She had also lost a significant amount of weight, approximately fifty pounds. At about this time, more nonverbal incidents began occurring even though she moved from the paint shop back to the core assembly area. For instance, someone left a Penthouse magazine on her toolbox. Another day, Gilbert left her can of diet Pepsi on the table in a break area to respond to a repair call. When she returned, someone had placed a magazine next to her drink to make it look as if she had been reading an article entitled "Why Men Have So Many Sperm." That summer, in a separate incident, Gilbert returned to an area that she had blocked from public view to use as a changing area to find that someone had urinated on a chair on which she ordinarily sat to change her boots.[4] She did not report these incidents immediately, and Hnat thought Gilbert was doing "pretty well."

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[4] Apparently, the male workers changed into their clothes in the aisles and did not walk the distance to their designated locker rooms, so Gilbert had adopted a similar practice, fashioning a changing area that allowed only her feet to be visible to people in the vicinity.

Some time in fall 1994, Gilbert found an article entitled "10 Times A Day Is Too Many" by Dr. Ruth Westheimer in her locker. Drafted in a question and answer format, the person requesting advice asked:

> Q: My girlfriend and I are very much in love and as we are both very highly sexed people, we make love often - up to 10 times in a day or night.
>
> However, we both find it very frustrating when my penis won't perform!
>
> Sometimes it gets too sore, or at other times after lots of sex it just won't rise no matter how much I want more. What can I do? The response was straightforward:
>
> A: The first thing I [Dr. Westheimer] would suggest: Don't make love 10 times in a day or night. Make love only once a night and prolong it with foreplay, but don't put all that pressure on your penis to perform or you are going to get into trouble. Lovemaking can be holding hands, cuddling or having and intimate conversations, but it's not trying to get into the Guinness Book of World Records.

Chrysler was aware of this article no later than October 10, 1994.

Again, though not clear on when this happened, Gilbert said that someone taped another lewd or derogatory cartoon to her toolbox or locker with the word "bitch" written on the tape. When she reported this incident, a supervisor, Richard Castleman, advised her to act like it did not bother her.

Consequently, she left the cartoon taped to her toolbox or locker for two weeks, until someone else removed it.

On October 10, 1994, Gilbert returned to her locker only to find that it had been pried open and someone had left a cartoon entitled "Highway Signs You Should Know" in the locker. The cartoon had fourteen "signs" that used drawings of naked bodies or body parts engaged in sexual activity to illustrate the meaning of each "sign." For instance, for "men at work," the cartoon showed a man and woman having intercourse. Gilbert reported the cartoon to Pilon and to management. Maya Baker, a human resources employee, spoke with Gilbert. Baker suggested that Gilbert use a designated locker room, which was a relatively long distance from her work area, instead of her makeshift changing room, so she would draw less attention to herself. Baker also spoke to the union stewards on the three shifts and stopped by Gilbert's work area several times before and after she reported to work to see if she could find anyone leaving the cartoons. Baker wanted to make it known to the workers that Chrysler was investigating Gilbert's allegations and that the person caught harassing Gilbert would be punished. Baker never caught the person who left the cartoon and lost touch with Gilbert because of Chrysler's policy of rotating human resources personnel through different shifts every few months.

In November 1994, Chrysler deposed Gilbert for the first time. In this deposition she detailed the comments and harassment, including some incidents she had not previously reported. Following this deposition, Gilbert indicated, no one from Chrysler approached her or attempted to investigate any of her complaints, though she continued working at the Jefferson North Assembly Plant as a millwright.

On March 12, 1995, Gilbert discovered an illustrated "poem" entitled "The Creation of a Pussy" that had evidently been posted in the carpenters' shop, about twenty yards from the millwrights' shop:

> Seven wise men with knowledge so fine, created a pussy to their design.
>
> First was a butcher, smart with wit, using a knive [sic], he gave it a slit.
>
> Second was a carpenter, strong and bold, with a hammer and chisel, he gave it a hole.
>
> Third was a tailor, tall and thin, by using red velvet, he lined it within.
>
> Fourth was a hunter, short and stout, with a piece of fox fur, he lined it without.
>
> Fifth was a fisherman, nasty as hell, threw in a fish and gave it a smell.
>
> Sixth was a preacher whose name was McGee, touched it and blessed it and said it could pee.
>
> Last came a sailor, dirty little runt, he sucked it and fucked it and called it a cunt.

Running around the border of the "poem" were caricatures of each of the seven "wise" men posed or brandishing an item that reflected each man's "skill;" the sailor, for example, was shown having intercourse with a woman. Gilbert reported this to Pilon and management. Tim Holland, a facilitator in the

human resources department and member of Chrysler's new Civil Rights Committee, handled this complaint. Though he had not had any previous involvement with Gilbert's complaints, he was aware that she had been experiencing harassment. Holland took a photograph of the bulletin board with the "poem" and spoke with Gilbert, who said that she did not want anyone fired over the incident, she just wanted the harassment to stop. Chrysler then removed the bulletin board.

Almost immediately after seeing the "poem," Gilbert relapsed to a severe degree, expressing fear that men who were originally involved in the harassment, who had been off of work for some time for other reasons, were returning. Though the details, including the exact time, are sketchy, Gilbert evidently turned on the gas in her oven and tried to go to "sleep." She went through detoxification at Sacred Heart Hospital from April 11, 1995, through April 25, 1995. She was either rehospitalized or participated in an intensive outpatient therapy program from April 27, 1995, through May 4, 1995, at the Eastwood Clinic. She did not remain sober, and was admitted to Harper Hospital for detoxification on July 8, 1995. Her records indicated that she was no longer suicidal by July 18, 1995.

Gilbert returned to work again after this hospitalization. In March 1997, Gilbert encountered a male coworker who kept insisting over and over again to her that he had a "big meat." She reportedly responded "whip it out," and told her supervisor about this incident. This coworker was reprimanded. At another time, Gilbert asked her supervisor, Gordon Potempa, about the allowable variation or tolerance in an adjustment she had to make in a repair, to which he barked that she had to make the repair to within a "cunt's

hair." She reported this incident, and Potempa - who had a history of being disciplined for inappropriate language - was reprimanded. On another occasion, Gilbert asked Herbert Hicks, her supervisor at the time, a question about work and he told her to "clean out" her "fucking ears." She did not report this comment at the time.

Even before Gilbert began drinking again, her new therapist, social worker Carol Katz, noticed that she was using food to replace her addiction to alcoholism, which was a warning sign of what was to come. In September or October 1997, Gilbert tried to commit suicide for a third time by cutting her wrists. She was admitted to St. John's Hospital. When she returned to work, she claimed, the harassment continued. She was readmitted to St. John's Hospital in 1998 and admitted to Bon Secours Hospital in 1999.

Gilbert's lawsuit went to trial in June 1999 while she continued to work for Chrysler. From the outset, Gilbert's attorney, Geoffrey Feiger, informed the jury that Gilbert had a longstanding substance abuse problem. However, his theory of the case was that Gilbert was in recovery by the time she started working for Chrysler, her prognosis was very good, her relatively lengthy sobriety demonstrated her motivation for and commitment to staying sober, and only the relentless sexual harassment pushed her back into alcoholism. Indeed, this alcoholism was more severe than what she had ever experienced in the past, and was accompanied by major depressive disorder, a new, permanent, and serious psychiatric condition that could lead to her death through suicide or the physical effects of continued alcoholism. Under this theory, Chrysler was legally responsible for Gilbert's damages, including future medical expenses, because she had

reported the harassment as early as May 1993, and Chrysler never investigated the harassment nor stopped it.

Feiger laid the factual foundation for this theory that Gilbert worked in a hostile environment by having several of Gilbert's coworkers testify. Dennis Whitenight and Fred Lemmerz were both friendly with Gilbert. Though neither man was a millwright, they were able to observe her working, and considered her to be very good at her work. Both men corroborated Gilbert's claims of individual acts of sexual harassment. For instance, Whitenight saw that the other millwrights would not help Gilbert, but just watched her work. In his view, it was no secret that they did not like having a woman work with them. Whitenight saw cartoons left for Gilbert, and even removed some before she could see them because he knew how upset Gilbert was about the harassment. Lemmerz was with Gilbert when she discovered that someone had urinated on her chair, noting that the odor was unmistakable. Both Lemmerz and Whitenight commented that the male millwrights did not treat each other the way they treated Gilbert, the harassment was open and obvious, and the supervisors should have been aware of what was happening. In fact, in his thirty-one years working for Chrysler, Lemmerz had never seen *anyone* treated as badly as Gilbert had been treated. Lemmerz confirmed that, until he retired in 1999, he heard people make harassing comments toward Gilbert. Both men also observed the radical changes in Gilbert's weight, her crying at work, and depression. Robert Gupton, a tool and die maker, echoed Whitenight's and Lemmerz's testimony about Gilbert. Gupton was impressed at Gilbert's skills, but he had seen that the male millwrights did not like her. Further, though Pilon thought that some of the incidents that Gilbert detailed were more akin to rough "shop talk," even Pilon conceded that some of the incidents,

like the Polaroid photograph of a penis, were unusual and "improper." Similarly, even though Standen viewed shop talk as a fact of life in the plant, he thought it was inappropriate.

Feiger asked each Chrysler employee about what, if any, investigation or remedial action the company had taken in response to Gilbert's situation. Battaglia claimed to be responsible for investigating only the penis wrestling cartoon incident, and maintained that talking with the other supervisors and union representatives was an adequate response to Gilbert's complaint. He believed that these supervisors had talked with the people working with Gilbert and gave them a copy of the sexual harassment policy, though he had no documentation that they did so. Pilon suggested that someone had tracked who received the policies. However, unlike the circumstances when Chrysler handed out other policies to the workers, it did not have the individuals sign a form to confirm that they had received a copy of the policy. Chrysler did not attempt to compare the handwriting on the wrestling cartoon with any of the employee records, it did not set up cameras for surveillance, as it had done when there was a theft/sabotage problem in the plant, nor did it assign someone on the floor to report harassment directly to management. Neither Battaglia nor Pilon confronted any of the men named in the penis wrestling cartoon. On occasion, Pilon asked some of the men about the cartoons, but he never learned who was leaving them. However, Christman said that he had met with at least some of the men named in the penis wrestling cartoon, including Bill Barr, who had denied playing any role in leaving the cartoon for Gilbert.

Feiger attempted to underscore the inadequacy of Chrysler's response in general by asking Pilon, "If somebody peed on [former Chrysler Chairman] Lee Iacocca's chair, [do]

you think he could find out who did it?" Pilon responded, "I believe so." Feiger then asked Pilon, who was seated with the defense as Chrysler's representative during the trial, whether Jurgen Schrempf was Chrysler's new chairman following its merger with Daimler. When Pilon responded affirmatively, Feiger asked, "If somebody peed on Mr. Schrempf's chair, do you think they would find out who did it?" Pilon again responded, "Yes, I believe if someone peed on his chair. If someone peed on my chair, I could find out who did it, sir." This prompted Feiger to ask, "Except nobody would find out who peed on Linda Gilbert's chair?" Pilon replied, "If I suspected someone, I would point them out." This last comment pointed to an overarching theme in the testimony of Battaglia, Pilon, and Baker. Namely, they claimed numerous times that it was Gilbert's responsibility to inform her supervisors or management of who was harassing her, and until she could identify her harasser or harassers, Chrysler could do nothing to stop the harassment - if it was actually harassment.

Hnat, who testified for four days as an expert, provided the most cohesive testimony at trial in terms of providing a timeline of Gilbert's improvement, relapses, short-term recoveries, and prognosis. Looking at Gilbert's sobriety between March 1992 and July or August 1993, including her "slip," Hnat concluded that she could be considered among a small group of people with the best prospect for lasting recovery. Studies he had read and his own experience as a therapist indicated that the majority of alcoholics - about seventy-two percent - relapsed within the first six months of recovery, which Gilbert did not do despite the stress of work. An even greater percentage of people relapsed within the first year of recovery, which Gilbert did not do. In his estimation, her likelihood for success was in the top ten percent of

alcoholics who sought treatment from a professional. Hnat was aware of Gilbert's drunk driving arrests, but believed that, regardless of any court orders to seek treatment, she had actually sought treatment out of a personal desire to recover. He pointed out that the length of her treatment was unusual, especially because her insurance had stopped paying for treatment and she had to pay for it herself. Hnat was also fully aware of Gilbert's troubled past, including: physical and verbal abuse by family members when she was a child; sexual abuse by someone outside her family when she was a child; being forced to have an abortion as a teenager; involvement with a manipulative boyfriend who sold drugs; poor or nonexistent family support; and minimal opportunities for relaxation. Nevertheless, in his opinion: Gilbert had always complied with his treatment plan; she was dying from a combination of alcoholism and major depressive disorder, which had permanently changed the way her brain worked and would cause her physical pain from pancreatitis or other physical ailments she would likely suffer; the records by other individuals who treated Gilbert confirmed this grim prognosis; and Gilbert's poor prognosis was primarily because of the sexual harassment at work. He believed that for her to make any significant changes she would need at least six months of inpatient therapy, an additional six months in a half-way house, and ongoing treatment. Hnat added that inpatient treatment cost $2,000 per week, and therapists charged about $85 an hour for individual therapy and $45 for group therapy.

Katz agreed with Hnat that Gilbert suffered from major depressive disorder, and that this was a serious, long-term problem. Katz had observed that Gilbert was also suffering from posttraumatic stress disorder in the form of dreams and flashbacks to her childhood abuse because of the harassment

at work. Like Hnat, Katz saw the relatively direct relationship between incidents of harassment aimed at Gilbert and her relapses and suicide attempts. Katz also agreed that Gilbert had a strong work ethic, she wanted to persevere, and that she would have had a good prognosis without the harassment at work. Further, when cross-examined on the matter, Katz said that had Gilbert's only motivation for attending therapy been a court order related to a drunk driving arrest, Gilbert would not have attended therapy for so long. As Katz put it, there were far easier ways to satisfy the typical treatment required in court orders than the intensive and lengthy therapy in which Gilbert had engaged.

Katz also had a long history of treating individuals who worked in the automobile industry, where substance abuse problems, even drinking on the job, was common in the assembly plants. Her experiences with these individuals led her to believe that Gilbert's coworkers would not ostracize her and treat her as badly as they had done and were doing just because she had a drinking problem. Moreover, Katz believed that harassment was a wellknown phenomenon for women who tried to break into a male-dominated workplace or career, irrespective of the individual's background.

Though denying that Gilbert had been sexually harassed, Chrysler posited numerous explanations for what had happened to Gilbert: the male millwrights did not like her because she had attended a formal apprenticeship program rather than rising through the ranks and being trained in the plant like the men; the men did not like to work with Gilbert because she drank on the job and had attendance problems; the comments and cartoons were commonplace shop talk not intended to be offensive, and which even Gilbert used; Gilbert was moody, difficult to work with, and provoked the men; if

there had been harassment, Chrysler was blameless because Gilbert did not report the harassment or name her harassers to management under the open door policy used in the plant; Gilbert's relapses were attributable solely to the problems in her personal life and individual failings, including her failure to attend Alcoholics Anonymous (AA) consistently or follow a twelve-step program; and depression was commonly understood to be an ailment from which people recovered, not the fatal disease Hnat said it was. Chrysler also claimed that only the incidents Gilbert directly reported to management could be considered alleged harassment. From Chrysler's perspective, because there were long periods between Gilbert's formal reports to management, the harassment consisted of a few, isolated events and Chrysler effectively prevented harassment from happening in the time between the reports. Chrysler claimed that, having only reported six unrelated acts of alleged harassment, Gilbert could not prove that she had been subjected to a hostile work environment.

Chrysler had mixed success in providing evidentiary support for these theories. For instance, Gilbert's attendance problem was documented and she had once been disciplined for drinking on the job and being away from her work area. Her supervisors, including Pilon, indicated that they had given her the benefit of the doubt a number of times because they knew she was dealing with personal problems. Additionally, all new hires went through a probationary period, when it would have been fairly easy to get Gilbert fired had the men really desired that result. Some of the witnesses, like Danielson, also testified that Nigoshian and Ernat, two journeymen millwrights with whom Gilbert had had significant problems, had been at Chrysler for a long time and did not get along with most people. Nigoshian had also left Chrysler around 1995, eliminating the possibility that he

had committed harassment later in Gilbert's employment with Chrysler.

On the other hand, though Potempa said that some men had asked not to work with Gilbert because they thought it was dangerous, he did not specifically say that any of the men had complained about her drinking. Though defense counsel, Johanna Armstrong, asked virtually all the Chrysler workers who testified whether they had seen Gilbert being moody, no one ever definitively replied that they had seen that behavior in Gilbert. Rather, some of the men had seen her try to act calmly in the face of offensive comments. At most, they had seen Gilbert cry after being harassed or reply when provoked. While some of the Chrysler workers recalled occasional incidents when Gilbert used a vulgar term, there was no evidence that she used shop talk regularly.

Armstrong pressed both Hnat and Katz about Gilbert's failure to attend AA consistently and whether Gilbert had been telling the truth in her therapy sessions. Hnat indicated that he believed that AA was generally beneficial to alcoholics, but to a lesser degree for women because of the dynamics of meetings and the difficulty in finding female sponsors. He also stressed that he did not think that AA or a similar program was an appropriate therapeutic approach for Gilbert - even if a court had ordered her to attend. In Hnat's opinion, AA helps people to deal with their emotions, but it was vital for Gilbert to minimize, not examine, the very strong emotions she was experiencing as a first step to her recovery. Only after she was sober and had some control over what she was experiencing could Gilbert begin to examine what was happening to her and attempt to develop coping strategies that did not involve alcohol or drugs. Additionally, Katz explained, Gilbert had tried to attend AA during their

work with each other, but Gilbert's sponsor had not offered her the support she needed. Katz added that Gilbert had no reason to lie in therapy.

As for Chrysler's open door policy, which developed out of a new management plan negotiated with the union that was supposed to give workers more input into matters at the plant, Armstrong had a difficult time supporting the idea that Gilbert's failure to make formal reports more frequently prevented more action by Chrysler. For example, Michael Jessamy, a human resources manager who did not have specific knowledge of Gilbert's experiences, explained the complaint procedure available. Aside from recourse to the union, Chrysler encouraged employees to report harassment to their immediate supervisors, and if their supervisors were the harassers, to go to management. Jessamy did *not* indicate that Chrysler always required a written report to human resources, labor relations, or plant security. Holland also made this point, noting that the supervisors on the floor were often responsible for complaints and would remain involved in the matter even if the complaint was forwarded to management. There is no question from the record that Gilbert reported some incidents as they happened to Pilon and Potempa, even if she did not make a written report. The testimony of Lemmerz, Whitenight, and Gupton also suggested that the harassment was so open and obvious that it would have been impossible for Gilbert's supervisors not to know what was happening to her, even if they did not spend every minute of the shift with her. Even Holland, who did not know Gilbert and was only involved in investigating her complaint about the "poem," had heard about the harassment Gilbert was experiencing by March 1995. However, perhaps in Chrysler's favor, Gilbert did concede that she developed a suspicion about who had left the penis wrestling cartoon in

her toolbox, but did not want to tell Chrysler because of a combination of her fear of reprisal and the lack of foundation for her suspicion.

The area in which the defense had the most success was discrediting or minimizing the effect some of the witnesses might have had on the jury. For instance, Feiger elicited testimony from Lemmerz, Whitenight, and others that they did not receive a copy of Chrysler's sexual harassment policy following the penis wrestling cartoon until Gilbert made the copies herself. However, Pilon, Battaglia, and Standen's testimony suggested that Chrysler had taken some steps to inform the millwrights about the sexual harassment policy, and none of these men testifying on behalf of Gilbert were millwrights. Armstrong also provided ample testimony that these individuals did not work directly with Gilbert, and they had only minimal opportunities to observe the quality of her work and the alleged harassment she experienced. Armstrong, who emphasized through her cross-examination of Hnat that he was not a medical doctor, also cast doubt on how well he understood what was happening to Gilbert, pointing out that he may not have understood that she was under court order to attend therapy, Gilbert may have been drinking without reporting that to him, and he never took any steps to verify that Gilbert was experiencing any alleged harassment at work. With respect to Gilbert's credibility and vulnerability, Armstrong questioned Gilbert, Hnat, Katz, and others about the many personal problems Gilbert had. Armstrong elicited information about Gilbert's troubled past, her history of treatment and hospitalization before 1992, her alcohol consumption and subsequent discipline at work, drunk driving arrests, home confinement coupled with drug testing, and loss of her driver's license, and the fact that she had been fired from her job at McDonald's. Armstrong also read part of

Gilbert's deposition testimony to the jury in which she mentioned finding a liquid, not urine, on her chair in 1994.

At the close of proofs the trial court, with the explicit consent from Armstrong and Feiger, instructed the jury on the law *before* the attorneys made their closing arguments. After the attorneys gave lengthy closing arguments, the trial court submitted the case to the jury with a special verdict slip. In returning their verdict in favor of Gilbert, the jury indicated that it found that Gilbert had been "subjected to sexual harassment in violation of the Michigan Civil Rights Act," and Chrysler had notice of the harassment, but did not "adequately investigate and take prompt and appropriate remedial action." The jury awarded Gilbert $20 million for her emotional damages and $1 million for future medical expenses.

II. Sexual Harassment

A. Overview

Following the jury's verdict, Chrysler brought a motion for JNOV, arguing in part that the evidence presented to the jury was insufficient to prove that Gilbert was subject to a hostile work environment, it had actual or constructive notice of the hostile environment, and it failed to take prompt remedial action. The trial court denied this aspect of the motion, holding that Gilbert had provided sufficient evidence of severe and pervasive harassment at her workplace that, when considered as a whole, constituted a hostile environment. With respect to the notice issue, the trial court held that Chrysler had actual notice that a hostile environment existed as early as 1993, when Gilbert verbally reported the penis wrestling cartoon to Pilon and in writing to

management, followed by her report regarding the Polaroid photograph, four other reports, and her deposition, which Chrysler's agents acting in their official capacity first took in 1994. The trial court also found that there was ample evidence that the harassment was constant and open for all to see, giving Chrysler constructive notice of the hostile environment. Finally, the trial court found that whether Chrysler's remedial actions, such as informing the employees of the sexual harassment policy, were adequate was a question of fact for the jury to decide. On appeal, Chrysler challenges the trial court's ruling on each of these components of the motion for JNOV.

B. Standard Of Review And Legal Standard

The discretionary language in the court rule concerning JNOV and case law suggest that appellate courts review a trial court's decision to deny a motion for JNOV to determine whether the trial court abused its discretion.[5] In the end, whether the trial court erred in denying Chrysler's motion for JNOV depends on whether there was a question of fact concerning which "reasonable jurors could have honestly reached different conclusions," making the jury the proper arbiter of the facts.[6] When reviewing the evidence to determine whether there was a factual dispute for the jury to settle, "this Court must view the testimony and all legitimate

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[5] *See* MCR 2.610(B); *Anton v State Farm Mutual Auto Ins Co*, 238 Mich. App. 673, 682; 607 N.W.2d 123 (2000).

[6] *Morinelli v Provident Life and Accident Ins Co*, 242 Mich. App. 255, 260-261; 617 N.W.2d 777 (2000).

inferences that may be drawn therefrom in a light most favorable to the nonmoving party."[7]

C. Prima Facie Case

Recently, in *Chambers v Trettco, Inc*,[8] the Michigan Supreme Court reviewed in-depth the law governing sexual harassment in the workplace. The Court began its analysis by noting:

> Through the Civil Rights Act, Michigan law recognizes that, in employment, freedom from discrimination because of sex is a civil right. MCL 37.2102. Employers are prohibited from violating this right, MCL 37.2202, and discrimination because of sex includes sexual harassment, MCL 37.2103(I). In turn, "sexual harassment" is specifically defined to include "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
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> (i) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment. ... (ii) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment...

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[7] *Id.* at 260.

[8] *Chambers v Trettco, Inc*, 463 Mich. 297; 614 N.W.2d 910 (2000).

> (iii) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment ...." [MCL 37.2103(I).]

The statute expressly addresses an employer's vicarious liability for sexual harassment committed by its employees by defining "employer" to include both the employer and the employer's agents. MCL 37.2201(a).

Sexual harassment that falls into one of the first two of these subsections is commonly labeled quid pro quo harassment. Sexual harassment that falls into the third subsection is commonly labeled hostile environment harassment. We have previously identified the elements that a party must establish in order to make out a claim for sexual harassment with respect to each of these categories.[9]

After explaining quid pro quo sexual harassment, the Supreme Court turned its attention to the hostile work environment theory:

> In order to establish a claim of hostile environment harassment, an employee must prove the following elements by a preponderance of the evidence:
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> "(1) the employee belonged to a protected group;
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> (2) the employee was subjected to communication or conduct on the basis of sex;

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[9] *Id.* at 309-310 (footnotes, case law, and parallel statutory citations omitted).

(3) the employee was subjected to unwelcome sexual conduct or communication;

(4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and

(5) respondeat superior."[10]

Further, the Court noted that it is always necessary to determine the extent of the employer's vicarious liability when harassment is committed by an agent. Because the Civil Rights Act expressly defines "employer" to include agents, we rely on common-law agency principles in determining when an employer is liable for sexual harassment committed by its employees.[11]

Nevertheless:

Strict imposition of vicarious liability on an employer "is illogical in a pure hostile environment setting" because, generally, in such a case, "the supervisor acts outside 'the scope of actual or apparent authority to hire, fire, discipline, or promote.'"[12] Hence, we have explained:

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[10] *Id.* at 311, quoting *Radtke v Everett*, 442 Mich. 368, 382-383; 501 N.W.2d 155 (1993).

[11] *Chambers, supra* at 311.

[12] *Radtke, supra* at 396, n 46 (citations omitted in *Chambers).*

> "Under the Michigan Civil Rights Act, an employer may avoid liability [in a hostile environment case] 'if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment.'
>
> Such prompt and appropriate remedial action will permit an employer to avoid liability if the plaintiff accuses either a co-worker, or a supervisor of sexual harassment. An employer, of course, must have notice of alleged harassment before being held liable for not implementing action."

The bottom line is that, in cases involving a hostile work environment claim, a plaintiff must show some fault on the part of the employer. ...[13]

D. Hostile Work Environment

In order to submit her claims to the jury, Gilbert had to prove that the nature of the sexual harassment to which she was subjected was "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. Whether sexual harassment at the workplace is sufficiently severe and persistent to affect seriously the psychological well being of employees is a question to be determined with regard to the totality of the circumstances."[14] Further, rather than seeing the severity of the harassment

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[13] *Chambers, supra* at 311-312.

[14] *Langlois v McDonald's Restaurants of Michigan, Inc*, 149 Mich. App. 309, 313; 385 N.W.2d 778 (1986), quoting *Henson v City of Dundee*, 682 F.2d 897, 904 (CA 11, 1982).

from Gilbert's perspective, the proper analysis examines whether "a reasonable person in the plaintiff's position would have perceived the conduct at issue as substantially interfering with employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment."[15]

Chrysler claims that Gilbert's background, emotional problems, and alcoholism made her a particularly sensitive person. Chrysler also maintains that shop talk and similarly vulgar activities are the norm in the plant setting, not harassment. Consequently, Chrysler contends, a reasonable person encountering the same six, discrete, reported acts committed over the course of seven years would not have considered them so severe that they created a hostile work environment. Each of these arguments is flawed.

First, Chrysler provides no authority for its proposition that the only acts relevant to the hostile environment element of Gilbert's claim were the six acts she formally reported. Instead, in an argument that dominates its brief, Chrysler asserts its lack of notice defense.[16] Case law, however, instructs that whether conduct is sufficiently severe must be viewed under the totality of the circumstances.[17] The totality of the circumstances in this case encompasses acts that Gilbert reported, such as the penis wrestling cartoon, and acts that

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[15] *Radtke, supra* at 372.

[16] In fact, Chrysler concedes that if it had adequate notice of the harassment, "a jury question was presented on the existence of a hostile work environment."

[17] *See Langlois, supra* at 313; *see also Radtke, supra* at 372, 387.

she did not report, such as the daily comments and derogatory remarks. Thus, we conclude that in determining whether Gilbert submitted sufficient evidence of hostile environment, the trial court was entitled to look at more than the six incidents she formally reported to management.

Second, there are competing considerations with respect to Chrysler's contention that Gilbert is more sensitive than an average, reasonable person. On the one hand, it appears that when Gilbert suffered the stress of harassment the *damages* she sustained were relatively more severe than those others sustain in that she relapsed into substance abuse and attempted suicide.[18] On the other hand, she appears to have been able to withstand the harassment better than others, maintaining sobriety for much of the first seventeen or eighteen months she worked at Chrysler and continuing to work more than eighty hours a week despite the harassment.

More importantly, the Supreme Court has concluded that the reasonable person standard is distinctly objective and does not adopt the view of any particular group or individual.[19] There is no evidence that Gilbert was especially sensitive to what she considered to be harassment; for example, she did not insist that the men abstain from all profanity. In fact, Pilon, Battaglia, Potempa, Standen, and other Chrysler

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[18] To the extent that Gilbert's susceptibility to damages from what a reasonable person would interpret as harassment might be germane to this inquiry, and it does not appear at all relevant, the law is clear: defendants take their victims as they find them, increased sensitivity and all. *See Wilkinson v Lee*, 463 Mich. 388, 394-395; 617 N.W.2d 305 (2000).

[19] *Radtke, supra* at 388-394.

workers indicated at trial that the conduct directed at Gilbert was minimally "improper," and was likely sexual harassment. It is also interesting to note that, at trial, the attorneys and some of the witnesses were apologetic for words they had to use to detail the verbal harassment Gilbert experienced, even spelling certain words to avoid saying them aloud.

Critically, the reasonable person standard also greatly undermines Chrysler's argument that the language at issue in this case is not actionable because it is "just shop talk" commonly used among the individuals working in automobile manufacturing plants.[20] Though the context of acts and language allegedly constituting harassment is certainly relevant as one of many factors comprising the totality of the circumstances,[21] there is no "reasonable millwright," "reasonable skilled tradesperson," or "reasonable automobile plant worker" standard that can be used to define what constitutes harassment in place of the reasonable person. Even if most millwrights, skilled tradespeople, or automobile plant workers might have found the language to be commonplace, the prevalence of harassing conduct or language does not, alone, make it more acceptable under the Civil Rights Act.[22]

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[20] *See id.* at 372.

[21] *See id.* at 389-391; *see also Oncale v Sundowner Offshore Services, Inc*, 523 U.S. 75, 81; 118 S. Ct. 998; 140 L. Ed. 2d 201 (1998).

[22] *See Radtke, supra* at 390, quoting Prosser & Keeton, Torts (5th ed), § 32, at 175 ("' The courts have gone to unusual pains to emphasize the abstract and hypothetical character of this mythical [reasonable] person. He is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is a

Accordingly, keeping in mind the objective perspective the reasonable person standards requires and the favorable manner in which the Court must view the evidence,[23] we conclude that the record leaves no reason to believe that any particular sensitivity Gilbert had made her perceive the conduct aimed at her as harassing when a reasonable person would not find it offensive or hostile.

Third, returning to the totality of the circumstances viewed in the light most favorable to Gilbert,[24] a reasonable person would have no trouble concluding that the harassment she suffered was sufficiently severe and pervasive to constitute a hostile environment. A reasonable person, for example, would consider someone urinating on that person's chair to be a hostile act.[25] Certainly, there was no evidence that this was an accident, nor an innocuous tradition practiced among the male millwrights. Similarly, a reasonable person would consider a photograph of male genitalia left on a woman's toolbox soon after that woman had reported a previous harassing incident as a reprisal. One or more people

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prudent and careful person, who is always up to standard ... He is rather a personification of a community ideal of reasonable behavior, determined by the jury's social judgment.'").

[23] Interestingly, though Chrysler correctly insists that this Court apply the objective reasonable person standard, its sexual harassment policy provides a subjective standard, saying, "It is important to note that harassment, in any form, is in the eye of the recipient."

[24] *See Morinelli, supra* at 260.

[25] Cf. *Mancuso v Atlantic City*, 193 F. Supp. 2d 789, 803 (D NJ, 2002).

had had evidently delivered this message previously by assembling pieces of hose to look like a penis, which was left for Gilbert on her toolbox. Seven years of daily references to Gilbert as a "asshole," "bitch," "whore," and "cunt" connected these incidents. There was no evidence that this was simply a form of affectionate familiarity the men used with each other, which they naturally extended to Gilbert. Instead, the record suggests that these names were used in a derogatory manner, and the dictionary confirms that the commonplace slang meaning for each of these terms is derogatory.[26]

Furthermore, this case involved more than name-calling or the occasional bawdy joke that would have no effect on Gilbert's working conditions. The evidence presented at trial indicated that coworkers interfered with Gilbert's work, refused to help her even when assigned to do so, and broke into her locker to deliver cartoons and other material. As a whole, these acts sent a clear message to Gilbert that she did not belong at the plant because she was a woman and, therefore, she should quit. Thus, this case stands in contrast to *Linebaugh v Sheraton Michigan Corp*.[27] In *Linebaugh*, this

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[26] *See Random House Webster's College* Dictionary (2d ed), p 80 ("asshole" is a "vulgar" term referring to a "stupid, mean or contemptible person" or "the worst part of a place or thing"), p 135 (a "bitch" is "a malicious, unpleasant, selfish woman"), p 322 (a "cunt" is an "offensive" term used for a woman" and means a "contemptible or unpleasant person"), p 1467 (a "whore" is "a prostitute, especially a woman who engages in promiscuous sexual intercourse for money").

[27] *Linebaugh v Sheraton Michigan Corp*, 198 Mich. App. 335; 497 N.W.2d 585 (1993).

Court held that a cartoon posted in the female plaintiff's workplace depicting her and one of her male coworkers in sexual activity was equally offensive to both individuals, and therefore not "gender-oriented" discrimination actionable under the CRA.[28] Needless to say, the sexual activity portrayed in the cartoons in this case was not gender neutral.

Though this case involves precisely the type of conduct the CRA prohibits,[29] Chrysler emphasizes the absence of physical assaults against Gilbert. While that may place the conduct in this case somewhat lower on the continuum of harassment than the worst abuse ever perpetrated in an employment setting, it does nothing to redeem the conduct at issue. Nor is there authority for Chrysler's suggestion that the law limits recovery to hostile environment cases involving physical assault. In sum, viewed in the light most favorable to Gilbert, a reasonable person could conclude that a question of fact existed concerning the degree and pervasiveness of hostility at this workplace, giving the jury a proper role in deciding this issue.

E. Actual And Constructive Notice

The key point Chrysler makes in its brief on appeal, which the case law amply supports, is that "an employer must have actual or constructive notice of the alleged harassment

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[28] *Id.* at 341.

[29] *See Radtke, supra* at 383 (the harassing conduct need not be sexual in nature, but directed at the plaintiff because of the plaintiff's sex).

before liability will attach to the employer."[30] In 1982, the United States Courts of Appeals for the Eleventh Circuit explained the concepts of actual and constructive notice.[31] Courts of this state have since adopted this formulation, which states that The employee can demonstrate that the employer knew of the harassment by showing that she complained to higher management of the harassment, or by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge.[32] Recently, this Court defined the "higher management" language from this federal precedent to mean that, for an employer to have actual notice of harassment, the employee must report the harassing conduct to "someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining the offensive employee."[33] This Court has not, however, altered or further defined the circumstances pertinent to constructive notice.[34] Chrysler contends that it lacked both actual and constructive notice of the reported and unreported harassment Gilbert experienced

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[30] *Sheridan v Forest Hills Public Schools*, 247 Mich. App. 611, 621; 637 N.W.2d 536 (2001); *see also Downer v Detroit Receiving Hosp*, 191 Mich. App. 232, 235; 477 N.W.2d 146 (1991).

[31] *See Henson, supra.*

[32] *Id.* at 904 (citations omitted); *see also McCarthy v State Farm Ins Co*, 170 Mich. App. 451, 457; 428 N.W.2d 692 (1988), adopting *Henson*.

[33] *Sheridan, supra* at 622.

[34] *See id.* at 627.

and, therefore, it could not be held liable despite the jury's verdict.

Chrysler claims that, even though Gilbert reported six incidents to management, it lacked actual notice of these incidents because she withheld the name or initials of her harasser or harassers. There is no merit to this argument. As the Supreme Court reaffirmed in *Chambers*, in order to hold an employer responsible for its employees' harassing conduct under the theory of respondeat superior, the employer must have notice "'"of the alleged hostile work *environment.*"'"[35] The key word here is "environment." In order to have actual notice that a hostile *environment* exists, an employer need not necessarily have notice of every harassing incident.[36] The amount of information known to the employer, and when it became known, is relevant to whether the investigation it undertakes and whether the remedy it puts in place is reasonably adequate. The nature of Gilbert's complaints, many of which she or which another Chrysler documented in writing, directly notified Chrysler that she was experiencing harassment and considered her environment to be hostile to her because of her sex. It cannot be said that Chrysler was actually unaware of these reported incidents.

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[35] *Chambers, supra* at 312, quoting *Radtke, supra* at 396, quoting *Downer, supra* at 234 (emphasis added).

[36] *See Chambers, supra* at 319 ("[N] otice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been *aware of a substantial probability that sexual harassment was occurring.*") (emphasis added).

Whether Chrysler had actual notice of the incidents Gilbert did not formally report to human resources, labor relations, or security is a more difficult question in light of the requirement that an employee report harassment to "higher management." In a recent case, this Court held that it was insufficient for the plaintiff, a custodian, to report the harassment to her supervisor, a head custodian who was not part of management, especially because the sexual harassment policy in effect informed her to report harassment to an "appropriate supervisor."[37] Pilon, Potempa, and Gilbert's other immediate supervisors to whom Gilbert claimed to have reported the harassment most frequently were not part of management. However, Chrysler's sexual harassment policy,[38] which Jessamy confirmed at trial, instructs employees to report suspected harassment to an "immediate supervisor or manager. If the complaint is regarding conduct of his/her immediate supervisor or manager, the employee should contact" a listed person in the personnel department. If an employee does report the incident to an immediate supervisor or manager, the sexual harassment policy provides that the immediate supervisor or manager "should inform the employee that a thorough investigation will be conducted and then contact the Personnel Manager immediately." Apparently, though immediate supervisors and managers may not be considered sufficiently "high" in management to provide actual notice in other corporations, Chrysler has chosen to designate them as appropriate individuals to receivereports for the purpose of notice for coworker harassment. As Holland suggested, supervisors can handle

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[37] *Sheridan, supra* at 623-625.

[38] Chrysler stated this policy in a bulletin, dated May 27, 1993, immediately after Gilbert reported the wrestling cartoon.

some complaints by themselves, and often remain involved in cases once higher management becomes involved. Accordingly, it is at least arguable Gilbert provided actual notice of coworker harassment when she informed Pilon, Potempa, and other supervisors about what she was experiencing, although it was an inadequate method of complaining about harassment from her supervisors.

Even if reporting these incidents to Gilbert's immediate supervisors was insufficient to provide Chrysler with actual notice of the harassment for which she did not contemporaneously lodge a more formal complaint with someone higher in management, she did report the vast majority of these events when Chrysler deposed her. Chrysler, however, contends that notice given to its attorneys after Gilbert filed suit was insufficient as a matter of law. Chrysler does not provide any authority for this proposition. This case is unusual in that Gilbert continued to work for Chrysler even after filing suit and had new incidents to report. Of course, to the extent that she was reporting older incidents in an untimely manner, a jury could certainly consider whether Chrysler could do anything in response to those older events. However, Gilbert's deposition testimony effectively alerted "higher management" of the ongoing harassment because Chrysler's attorneys were acting as agents for the corporation in gathering this information. Chrysler is "' deemed bound by the acts of [its] lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."'"[39] In simpler terms, "[n] otice

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[39] *See People v Carter*, 462 Mich. 206, 218; 612 N.W.2d 144 (2000), quoting New York v Hill, 528 U.S. 110; 120 S. Ct. 659, 663; 145 L. Ed. 2d 560 (2000), quoting *Link v Wabash R Co*, 370 U.S. 626, 634; 82 S. Ct. 1386; 8 L. Ed. 2d 734 (1962), quoting

to an attorney relevant to a given matter is notice to the client employing him in relation to such matter."[40]

Chrysler also claims that any harassment Gilbert suffered was insufficiently obvious and severe to attribute knowledge of the harassment to the corporation. According to Whitenight, Lemmerz, and Gilbert, the harassment was harsh and obvious to anyone who worked on the plant floor, including Gilbert's supervisors. Even Holland had heard about the harassment Gilbert was experiencing before he became involved in investigating the "poem" in March 1995. To the contrary, Baker claimed not to see anything suspicious the times she walked around the floor and Gilbert's supervisors characterized much of the conduct at issue as merely inappropriate, not harassment. Determining what to believe when the evidence conflicts, as with this issue, is just the sort of question that should be left to the jury.[41] F. Investigation And Remedial Action

Chrysler acknowledges that it has an obligation to "take prompt and adequate remedial action upon notice of the creation of a hostile work environment."[42] Nevertheless, Chryslerclaims that it conducted the appropriate investigations and took immediate action after each of the six formal complaints. Chrysler adds that the length of time between complaints indicated that the remedies were adequate, and that

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Smith v Ayer, 101 U.S. 320, 326; 25 L. Ed. 955 (1880).

[40] *Kastle v Clemons*, 330 Mich. 28, 32; 46 N.W.2d 450 (1951).

[41] *See Anton, supra* at 689.

[42] *Chambers, supra* at 312, interpreting *Radtke, supra*.

it cannot be held responsible for investigating and taking action for all the other acts of alleged harassment, primarily because Gilbert had not cooperated in reporting them.

According to Gilbert's proofs, Chrysler did little, if anything, each time she made a formal report of an incident to management, and certainly nothing that was designed to prevent future harassment. For instance, none of the witnesses at trial could point to any investigation of any pre-November 1994 incident Chrysler undertook after it deposed Gilbert, even though a number of incidents had occurred close in time to the deposition and after it. Chrysler never found any of the individuals who left the cartoons for Gilbert, broke into her locker, or blocked her toolbox, though it provided evidence that other people may have experienced similar acts. Though Chrysler reprimanded Potempa, as well as Gilbert's coworker who made the "big meat" comments, there is no evidence that it ever disciplined anyone else for harassing Gilbert, much less stopped the harassment from occurring. Pilon conceded that if some of what had happened to Gilbert had happened to either of Chrysler's recent chairmen, Chrysler could have determined who committed the harassment. There was also testimony that when there was either theft or sabotage at the plant, Chrysler had used cameras to catch the perpetrator. Some of Chrysler's remedies were also focused on Gilbert, such as transferring her to another shift, rather than attempting an investigation. Still, Chrysler elicited testimony from Gilbert that she suspected who had left the cartoon but would not reveal who it was. Her memory of exact dates was also hazy, making investigation without a contemporaneous complaint difficult or impossible. Some of the Chrysler employees who testified also suggested that collective bargaining agreements and other regulations prevented surveillance and other investigation techniques. This is

another issue best left to the jury because the evidence presented by both parties conflicted.[43]

G. Conclusion

Returning to the standards applicable to the motion for JNOV, it is clear that Chrysler's arguments either lacked legal merit or that a factual debate existed with respect to each of the issues it raises concerning the evidence of Gilbert's prima facie case. Viewing the evidence in the light most favorable to Gilbert, we conclude that the trial court did not abuse its discretion in denying the motion for JNOV on these grounds.

III. Feiger A. Background

The trial in this case took place over the course of a month. During that month, Armstrong objected approximately forty-two times. These objections were largely routine challenges to the evidence, including the relevance of testimony or exhibits and the evidentiary foundation for statements. The trial court overruled about twenty of these objections and sustained about fifteen of the objections. Not once during the trial did Armstrong object to Feiger's demeanor or his language.

In his closing arguments, Feiger outlined the harassment and damages he argued that Gilbert had proved and then described how he thought the jury should have Chrysler compensate her:

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[43] *See Anton, supra* at 689.

The law of this state requires you to consider all of those things from March of 1992 to the present and into the future. Now, how you do that, God speed, I don't know that. You must consider the days, the minutes, the hours, and the weeks that she went through for seven years, and for as iong as God gives her on this plant [sic], God help her, and allows her to maintain on this plant [sic], despite the disease that she is suffering from, the disease that she will suffer from, and that will kill her, you must consider that, and so that your verdict reflect [sic] the enormity of the wrong, the intolerable nature of the injury, the extent of the humiliation, the torture, the extent of the outrage perpetrated upon, I can suggest, and you can go back in your jury room, and you determine whether this is right. That it should be more, that it should be less. But I suggest to you that you award as full and complete justice for the seven years of past and for the future, whatever it holds, $140,000,000.00 You can break it any way you want. No one should ever, "we hold these truths to be self-evident that all people are created equal. That each one of us is entitled and endowed by our creator with certain unalienable rights, including those are the right to life, liberty, and the pursuit of happiness." And with all due respect, the hopes and dreams of all free Americans exist in Linda [Gilbert] the way they do in all of us. And to destroy those, and to subject anyone to the type of indignity and injustice and intolerable acts that this woman has been subjected to for the past seven years, that figure reflects a symbol, if you will, since you can't adequately compensate her for every -

Armstrong interjected, arguing:

> Your Honor, I object. He is strictly going to punitive damages instructions at this point. He is not talking about compensating for injuries. He is talking about sending a message. Certainly, that number is also talking about sending a message. That is not permitted in this case, your Honor. Strictly compensation for damages to the extent any liability has been found.

Feiger quickly responded, "Let me make it clear. This figure will not adequate. compensate her. This figure is too low. She will never recover her health, but she may recover some sense of dignity."

The trial court, ruling on the motion, agreed with Armstrong and admonished Feiger before issuing a curative instruction:

> Members of the jury, with regards to the argument of counsel, that is not to be considered by you as the law that you are to apply in the case. We have already given you the instructions of law as to the proper elements of damage and how you are to compute damage. So, if you heard anything that is in conflict with what the Court told you with regard to that, then disregard what the lawyers say and rely on your memory of the Court's instructions.

Feiger then continued with his closing argument. He compared Gilbert's bravery and fortitude to the sabras who settled Israel after World War II, to Rosa Parks' decision to assert her rights, and to Arthur Ashe's decision to announce publicly that he had AIDS. He compared Gilbert's suffering

to the mythological Prometheus enduring a bird pecking at him daily, calling Gilbert's experience "abuse," "torture," and other terms. Feiger also urged the jury to "ring the bell of justice" and make a "loud," "clear," and "high" award several times. Armstrong did not object to any of these statements.

After trial, Chrysler moved for a new trial or remittitur because, it claimed, Feiger had committed misconduct in asking the jury to award punitive damages in this section of his argument and by asking the jury to ring the bell of justice, as well as by using hyperbole. The trial court noted that it had properly instructed the jury concerning allowable damages, and the special verdict slip only provided a space for the jury to award compensatory damages, not punitive damages. Consequently, the trial court denied the motion because there was "no evidence here to believe that the jury did anything but award compensatory damages." With respect to Feiger's hyperbole, the trial court indicated that it was "difficult to conclude" that the comments diverted the jury from the issues at hand since the comments to which Defendant objects go to the core of the case. To take just one example, Defendant objects to his [Feiger] saying that Plaintiff had been exposed to a "living hell" by harassment. Obviously, the quality of the harassment and its impact on Plaintiff were directly relevant. ... The trial court found it particularly relevant that, if inflammatory, these remarks did not draw a single objection. In a lengthy footnote, the trial court added that to paraphrase a writer's words about a particularly acerbic critic, this might be a case in which venom serves as its own toxin, so to speak. If a lawyer peppers her statements to the jury with incendiary and exaggerated references and comparisons, she risks alienating the jury. Unfounded comparisons and the like will

lead jurors to discount not only the comparisons themselves but everything else the lawyer says. ...

The self-correcting nature of the problem becomes especially strong for allusions to important historical events; at oral argument, counsel for defense alleged that Plaintiff's counsel had gone to the extent of equating what Linda Gilbert suffered to what the Jews suffered at the hands of the Nazis during Word War II, the implication being, according to defense counsel, that Chrysler was equated to the Nazis. The public in general, not only people who lost relatives during the Holocaust, might be deeply offended by such comparisons ...

On appeal, without specifying the precise legal ground on which the trial court should have granted a new trial, Chrysler contends that Feiger used inappropriate hyperbole at trial that mischaracterized the evidence and that he appealed to the jury to award punitive damages, partly on the basis of the Chrysler's new German ownership.

B. Standard Of Review

This Court reviews a trial court's decision to grant or deny a motion for remittitur to determine whether the trial court abused its discretion.[44] The abuse of discretion standard of review also applies to a trial court's decision to grant or deny a motion for a new trial.[45]

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[44] *See Leavitt v Monaco Coach Corp*, 241 Mich. App. 288, 305; 616 N.W.2d 175 (2000).

[45] *See Morinelli, supra* at 261.

C. Attorney Conduct

MCR 2.611 permits a trial court to grant a motion for a new trial if a party's "substantial rights are materially affected"[46] by "[m] isconduct of the ...prevailing party."[47]

When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action.[48] Attorney misconduct can take the form of comments in examination or arguments made directly to the jury.[49]

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[46] MCR 2.611(A)(1).

[47] MCR 2.611(A)(1)(b).

[48] *Reetz v Kinsman Marine Transit Co*, 416 Mich. 97, 102-103; 330 N.W.2d 638 (1982).

[49] *See*, generally, *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich. App. 461, 464-466; 624 N.W.2d 427 (2000); *Badalamenti v Beaumont Hosp - Troy*, 237 Mich. App. 278, 290-

However, given an attorney's obligation to be a zealous advocate for his client's interests, not every comment or question that vividly draws attention to the lack of merit in the opposing party's evidence and arguments is misconduct.[50] Rather, to be misconduct, the comment or question must be designed to inflame the jurors' passions so they will disregard the evidence in rendering a verdict, thereby causing *unfair* prejudice to the opposing party.[51]

According to Chrysler, plaintiff's counsel used declamatory questions, before-the-jury-colloquies, and closing argument to convey totally distorted, hyperbolic, and inflammatory descriptions - "daily and brutal sexual harassment, "never ending repeated incessant activities," "daily torture, "harassment is far too gentle a word," "brutal, brutal sexual abuse," and the like. He even made the preposterous claim that plaintiff had suffered "15,000 incidents" of sexual harassment, and asserted falsely that "some of the supervisors even joined in the abuse."[52] We find little support for Chrysler's claims with regard to Feiger's

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291; 602 N.W.2d 854 (1999).

[50] *See*, generally, *Schunk v Zeff & Zeff, PC*, 109 Mich. App. 163, ; 311 N.W.2d 322 (1981) ("[A] n attorney has a duty to be a zealous advocate. The lawyer's obligation to his client thus permits the lawyer to assert that view of the law most favorable to the client.").

[51] *See Esparaza v Manning*, 148 Mich. App. 371, 377; 384 N.W.2d 168 (1986); *May v Parke, Davis & Co*, 142 Mich. App. 404, 370 N.W.2d 3711 422-423; 370 N.W.2d 371 (1985).

[52] Citations to the record omitted.

comments on most of the pages it cited. For instance, on one of the pages Chrysler claims Feiger used hyperbole, he merely asked Hnat why Gilbert "was hospitalized" and what effect "years of sexual harassment," which consisted of "never ending repeated incessant activities," would have on her. Hyperbole is "obvious and intentional exaggeration."[53] Notably, not one of Feiger's comments during trial drew an objection from Armstrong.

As for Feiger's comments during closing arguments, which is when the majority of the passages Chrysler now cites occurred, we conclude that they did not amount to misconduct. Feiger indisputably used vibrant terms to describe the harassment's severity. However, words like "torture," which means "extreme anguish of body or mind,"[54] and "abuse," which means "to speak insultingly or harshly to or about," were shocking only because the jury had an evidentiary basis to conclude that they were accurate characterizations of what had occurred.[55] Though Chrysler contends that Feiger suggested to the jury that Gilbert had suffered physical assaults when there was no proof of any physical assaults, the context in which Feiger made those comments does not permit that inference. Rather, as with the other comments, Feiger was emphasizing the unremitting and severe nature of the harassment, not insisting that anyone had physically assaulted Gilbert.

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[53] *See Random House Webster, supra* at 641.

[54] *Id.* at 1358.

[55] *Id.* at 6.

More importantly, while Chrysler contends that Feiger misrepresented the record in arguing that Gilbert's supervisors engaged in the harassment, Gilbert did provide evidence that Potempa and Hicks used inappropriate language with her, which the jury might interpret as harassment. Similarly, though Chrysler maintains that there was no support for Feiger's argument that it failed to undertake any investigation, the evidence related to this issue was in conflict. Chrysler could not document what steps it had taken. This left a credibility contest between Gilbert, who said that Chrysler did not look into what had happened to her, or if it did, took no action on her behalf, and Pilon and others who claimed that they had done all that was possible because she was withholding information.

Further, Chrysler claims that Feiger was drawing parallels between Nazi atrocities against Jews during the Holocaust with Chrysler as a way to inflame the jury against its new German ownership. In fact, though Feiger suggested that the jury send a message to the Chrysler board room in Stuttgart, he never drew any explicit connection between the Nazis and the German corporation. Rather he referred to the Holocaust survivors who immigrated to Israel as symbolic of Gilbert's strength. We conclude that Chrysler's new corporate identity was never an issue at trial.

Chrysler clearly mounted a vigorous defense. However, Gilbert and the witnesses testifying on her behalf provided an ample evidentiary basis for jurors to conclude, consistent with Feiger's theories and remarks, that Gilbert truly suffered because of the harassment she experienced at Chrysler and that Chrysler's response was either nonexistent or inadequate.

The jury just found Gilbert's evidence more convincing than Chrysler's evidence, as was its right.[56]

The trial court's behavior stands out against this backdrop of conflicting evidence. Though Chrysler asserts that the trial court itself acted improperly, the trial court took all appropriate actions to ensure that the jury understood the limited role of the attorneys' arguments and that it applied the proper law when determining liability and calculating damages.[57] We agree with the trial court that the jury's large award stemmed from the evidence, not from any allegedly improper argument. As the trial court noted, Feiger's comments were evidently minor enough to avoid Armstrong's attention. She objected only once during Feiger's closing arguments to his punitive damages argument, and not once to the other comments or questions Chrysler now claims were misconduct. Nor did Armstrong comment on Feiger's dramatics at any time during her own argument, which spanned more than one hundred pages of transcript and what appears to be about two hours.

It is safe to say that the circumstances of this case make it unusual and, perhaps, more severe than most other harassment claims. This is so because, despite the extremely long hours Gilbert worked, during which she was exposed to

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[56] *See Hutton v Roberts*, 182 Mich. App. 153, 162, 451 N.W.2d 536 (1989).

[57] *See Esparaza, supra* at 377-379 (plaintiff's attorney's argument asking for punitive damages was harmless because the trial court instructed the jury on the proper measure of damages and the verdict slip did not provide the jury an opportunity to award punitive damages).

continuing harassment, Gilbert did not quit. If the jurors believed the testimony Gilbert, Lemmerz, Gupton, Whitenight, Hnat, and Katz provided, they could easily agree that Gilbert's experience at Chrysler was terrible, and certainly enough to cause her to start drinking again and attempt suicide. With her history of relapses and attempted suicides, added to Katz and Hnat's testimony, it is no stretch of the imagination that Gilbert might die prematurely, whether from the physical effects of alcoholism, another suicide attempt from her major depressive disorder, or in an alcohol-related car crash. Further, in a move that might be described as provident, the trial court decided to instruct the jury on the law *before* the jury heard closing arguments. In this way, the trial court ensured that the jury knew the limited value of the lawyers' arguments before hearing them, minimizing the potential that any inflammatory statements would actually inflame the jurors. Even the jurors themselves indicated that they were exercising their independent abilities to reason, rejecting the figure Feiger requested in damages, awarding a far smaller - though still large - amount.

We conclude that there is insufficient evidence that Feiger's arguments were misconduct that "materially affected" affected Chrysler's substantial rights, especially given the possibility that Armstrong did not object at trial. Consequently, the trial court did not abuse its discretion in denying the motion for new trial and remittitur on these grounds.

IV. Hnat A. Standard of Review

Chrysler argues that several, disparate portions of Hnat's testimony proved that he and Feiger colluded to perpetrate a fraud in this case. In light of this fraud, Chrysler argues, the

trial court should have granted its motions for a new trial, an evidentiary hearing, or relief from judgment. This Court reviews a trial court's decision to deny a motion for a new trial to determine whether it abused its discretion,[58] applying the same standard of review to decisions regarding motions for an evidentiary hearing and relief from judgment.[59]

B. Hnat's Relationship With Feiger

In his opening statement to the jury, Feiger revealed to the jury that he knew Hnat, Hnat had worked on Feiger's 1998 gubernatorial campaign, and that Hnat had worked for his law firm on other cases in 1998 and 1999, after he treated Gilbert. Feiger claimed that Hnat did not have any contact with him or his law firm while he was treating Gilbert. Consequently, he indicated to the jury, the fact that Hnat was testifying in this case was a coincidence. After the summer 1999 trial, Chrysler found newspaper articles regarding Feiger's gubernatorial campaign and a television interview from April 1999, which discussed Hnat's friendship with Feiger. Chrysler also allegedly found proof that Hnat had worked with Feiger on many cases. According to Chrysler, Feiger and Hnat had purposefully withheld this information, critical to Hnat's credibility, from the jury at trial, which is why it claimed that it was entitled to a new trial or other relief. Feiger and Hnat responded to Chrysler's motion for a new trial with affidavits in which each claimed to have become acquainted with each other while attending the University of

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[58] *See Morinelli, supra* at 261.

[59] *See Persichini v William Beaumont Hosp*, 238 Mich. App. 626, 645; 607 N.W.2d 100 (1999); *Blue Water Fabricators, Inc v New Apex Co, Inc*, 205 Mich. App. 295, 300; 517 N.W.2d 319 (1994).

Michigan in the 1970s. Both men said that theirs was a casual relationship marked by occasional contact with each other over the years, with Hnat assisting Feiger only lately. They may have seen each other at social events, but did not spend time with each other. Hnat had *retained* another attorney in Feiger's firm to help him with a contract dispute and an employment dispute in 1990. However, Feiger said he had "little to no involvement" in either case. In the early 1990s, when Hnat was seeking a divorce from his wife, an attorney outside the Feiger firm had referred Hnat to Feiger to handle his divorce, but neither Feiger nor his firm handled the case. Feiger said that the first time he worked with Hnat was in 1996, when Feiger was defending Dr. Jack Kevorkian. Feiger said that "[a] fter that, and not beginning until late in the following year, 1997, Stephen Hnat has worked on many of my trial as a consultant."

The trial court denied Chrysler's motions concerning the depth of this relationship for three reasons. First, it concluded that " how to describe a relationship between two people inevitably calls for a subjective judgment: [sic] 'closeness' is in the eye of the beholder." Evidently, the trial court did not agree with Chrysler that the materials it produced varied greatly from how Feiger had described his relationship with Hnat to the jury. Second, the trial court reasoned that all the material Chrysler produced in support of its motions had existed before trial, but had not been discovered because of Chrysler's lack of diligence. In the trial court's view, this lack of diligence was inconsistent with the requirements for a motion for a new trial and relief from judgment. Finally, the trial court noted that federal precedent held that witness perjury was not grounds for a new trial because it could have been challenged at trial.

MCR 2.611 allows a new trial for "material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial." That the material Chrysler discovered had been released publicly no less than two months before trial suggests that it could have discovered in time to be presented to the jury. MCR 2.612(C)(1)(b) is a similar court rule, permitting relief from judgment if a party comes across "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B)." This court rule does not apply because Chrysler did file a timely motion for a new trial. MCR 2.612(C)(1)©, the court rule allowing relief from judgment, does also permit relief if there was "fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Despite Chrysler's attempts to characterize Feiger's and Hnat' representation of their relationship as springing from some improper motivation, there was no evidence that Feiger referred Hnat to Gilbert or vice versa, much less evidence of fraud. In fact, regardless of the relationship Feiger had with Hnat, he did treat Gilbert for about two years and, therefore, had pertinent factual details to relate to the jury.

Feiger revealed his relationship with Hnat in his opening statement. Feiger did not describe this relationship in detail. Armstrong also asked Hnat about the relationship during her cross-examination, but did not ask him any specific questions that would have elicited the information Chrysler subsequently discovered. As the trial court observed, the strength of a bond between people is a largely subjective question, and there is no evidence that Hnat actually provided any testimony about the relationship that he knew was false. In her closing arguments, Armstrong also argued that Gilbert's case rested on Hnat's testimony and that he was not

believable because of his connection to Feiger. The jury certainly had enough information about this connection to conclude, if it chose to do so, that Hnat might not be objective or credible. If there was any error in not revealing more of the relationship, the error was harmless and, therefore, does not merit reversal and a new trial for Chrysler.

C. Hnat's Credentials

When Feiger first called Hnat to the stand to testify, he had Hnat review his accomplishments and credentials for the jury. According to Hnat, he received a Pillsbury Award in 1980 for a thesis on psychology he had written while a graduate student. Feiger also asked Hnat, "What program specifically were you admitted to at the University of Michigan?" Hnat replied, "It was combined, doctoral studies in social work and through the Department of social work and doctoral studies in psychology through the Department of Psycho-Biology." Feiger inquired when he completed his studies, and Hnat revealed that he "did not complete the Ph. D." Instead, Hnat explained, "I stopped when I got my Masters degree in Psycho-Biology" in 1985. Feiger followed up this explanation by stating, "Your curriculum also indicates between that time between 1980 and 1985 when you received your degree in Psychology and Psycho-biology you were awarded master of social work in interpersonal practice. What was that?" Hnat then explained the foundation for psychiatric social work. Later, after the trial court accepted Hnat as an expert in "substance abuse care and treatment," Feiger asked Hnat to review one of Gilbert's hospital records, asking:

> In terms of her [Gilbert's] treatment at Sacred Heart, BiCounty Hospital, Eastwood Hospital, which is part

of St. John's Hospital, was she treated at those facilities by people such as yourself, counselors, MSWs [people holding masters degrees in social work], psychologists and psychiatrists with this type of expertise that you have described to us this morning? Hnat replied, "Yes. As a matter of fact, I trained Ms. Walsh" and other individuals who treated Gilbert at Sacred Heart Hospital. Though Armstrong did not object to any of this testimony, following trial, Chrysler moved for a new trial or relief from judgment. Chrysler claimed that Hnat did not earn the Pillsbury award, he had not received a master's degree in psycho-biology, and that he had misrepresented that he had credentials equivalent to a psychiatrist or psychologist. Hnat conceded that he had not received the Pillsbury award, claiming the statement was inadvertent, and clarified that he had completed the coursework necessary for a master's degree, and had not misrepresented his qualifications. The trial court rejected Chrysler's arguments, denying the motion on these grounds. As the trial court indicated in its written order and opinion, the inaccuracies in Hnat's testimony were not "large." Though Hnat had not earned the master's degree in psycho-biology, he had completed the coursework, giving him a legitimate background in the subject. Additionally, Hnat had never claimed at trial that he was a psychiatrist or psychologist. Overall, the trial court did not think that the flaws in Hnat's testimony were substantial, much less that they amounted to fraud.

The trial court, which heard Hnat's testimony and could see its effect on the jury, was in the best position to determine

whether Hnat had simply misspoken.[60] Further, Hnat freely admitted several times in his testimony that he was not a psychologist or psychiatrist, noting when he lacked information to answer questions regarding medicine or other areas outside his expertise. Feiger explicitly corrected himself the one or two times he accidentally called Hnat "Dr. Hnat," and Armstrong emphasized in her cross-examination of Hnat and closing argument that he was not a psychiatrist, psychologist, or any sort of doctor. Further, the reference to the Pillsbury award was fleeting, not a significant factor in Gilbert's case. Overall, Hnat's testimony was consistent with his actual credentials, including his experience treating substance abusers, which Hnat documented with letters from several individuals and organizations in response to the motion. The record suggests that there was little possibility that the jury misunderstood the scope of Hnat's expertise. The trial court did not err in concluding that these flaws in his testimony did not taint the trial and resulting verdict to the extent that a new trial was necessary. More importantly, there is no evidence that Feiger and Hnat colluded to make these misrepresentations, as Chrysler claimed. Consequently, the trial court did not err in denying the motions on these grounds.

D. Gilbert's Medical Records

According to Chrysler, Feiger and Hnat engaged in a scheme to deprive it of access to parts of Gilbert's medical records. This allegedly denied Chrysler an opportunity to reveal to the jury matters relating to Gilbert's willingness to seek treatment and the harassment she was experiencing.

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[60] *See*, generally, MCR 2.613©.

When the trial court denied Chrysler's motion for a new trial or relief from judgment on this ground, it placed the blame for Chrysler's lack of access to the information to its own attorneys. In the trial court's view, the parties here appear to have disagreed with the wording of the authorization designed to produce at least some of the records at issue.

Unfortunately, Defendant never brought a motion to compel to resolve this dispute. Similarly, with respect to the other sets of records, Defendant seems to have made only half-hearted efforts to obtain them. Indeed, the record shows that some of the records allegedly hidden by Plaintiff do not exist.

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Defendant here appears to have piggybacked on Plaintiff's own efforts to obtain records. Thus Defendant complains that it relied on a representation that Mr. Feiger had made at a pre-trial conference concerning the completeness of the records....Defendant ignores the fact that it had an independent responsibility to secure for itself the complete records.

On appeal, Chrysler claims that Feiger had issued subpoenas for the medical records, directing that they be delivered to his office, which was a scheme to deprive Chrysler of the records. This was the start of what Chrysler calls Feiger's attempt to "hijack" the records, worsened at trial because Hnat kept up a "charade" concerning the date he began treating Gilbert and her good prognosis for recovery when she began working at the Jefferson North Assembly Plant. There can be no merit to Chrysler's arguments with respect to Feiger's duty to share records that never existed.

Chrysler provides no authority for its proposition that it was somehow improper for Feiger to request Gilbert's medical records in order to prepare the case. Further, at trial, Chrysler fully explored the possibility that Gilbert was not firmly in recovery and did not have a good prognosis at the time she started her job in March 1992. In short, regardless of Feiger's strategy in obtaining the records, Chrysler has not provided evidence of fraud, much less that the records it did not see had evidence that would have affected the jury's verdict. At most, any error in the trial court's ruling that Chrysler had not articulated sufficient grounds for a new trial or relief of judgment was harmless.

E. Hnat's Representations Concerning Gilbert's Drunk Driving Record

At trial, Feiger and Armstrong both questioned Hnat extensively regarding why Gilbert started treatment with him. In Hnat's opinion, Gilbert started treatment voluntarily, because she had been going through a difficult time, and she wanted to feel better and stop abusing substances. Armstrong brought out the possibility that a court had ordered Gilbert to seek treatment, asking Hnat, "At the time that she saw Dr. Yousef,[61] was it your understanding that she was seeing Dr. Yousef relating in any way to her driving legal problems with regards to her driving?" Hnat answered, "No, my understanding the precipitant was she was upset about the breakup of a relationship."

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[61] Dr. Yousef was the psychiatrist in Hnat's clinic who evaluated Gilbert before referring her to Hnat.

Following trial, Chrysler contended that Gilbert's drunk driving record would have proven that she sought treatment because a court ordered her to do so, not because she was motivated to recover and sought treatment voluntarily. Chrysler claimed that Hnat had purposefully concealed this information. The trial court did not comment on this issue specifically.

Hnat's response in this passage and at other times during his testimony was not intended to verify or conclusively rule out the possibility Gilbert had been arrested for drunk driving before he began treating her or was under a court order to seek therapy. Rather, his testimony suggested that he personally observed Gilbert's motivation to recover and that this motivation could not be attributed merely to a court order compelling her to attend therapy. For instance, he explained, Gilbert sought treatment for much longer than a court order would require, even after her insurance stopped paying for the treatment. Further, Hnat's testimony suggested that whether Gilbert was under court order to seek therapy was irrelevant to how he treated her in therapy, giving him no reason to focus on this information. Even if this record had been available, Armstrong would have been unable to impeach Hnat on this issue any further. While the record may have clarified any court order in place when Gilbert sought treatment from Hnat, it would reveal nothing about Hnat's knowledge or memory of the order, or his alleged intent to conceal this information from the jury. As with the other issues raised, there simply is no evidence that Hnat intentionally misrepresented anything related to Gilbert's drunk driving record, making the trial court's ultimate ruling to deny the related motions proper.

V. Evidentiary Issues A. Standard Of Review

In its postjudgment motions for a new trial or remittitur, Chrysler challenged a number of the trial court's evidentiary rulings. On appeal, Chrysler maintains that the trial court's original evidentiary rulings, as well as its subsequent decision to deny the motions for a new trial or remittitur on this basis were erroneous. This Court reviews a trial court's decision to deny a motion for a new trial to determine whether it abused its discretion,[62] applying the same standard of review to decisions regarding motions for remittitur,[63] the admissibility of evidence,[64] and whether to qualify a witness as an expert.[65]

B. Deposition Testimony

At trial, Armstrong objected to Feiger's attempt to introduce transcripts of the depositions Chrysler took from Gilbert and Lemmerz. Feiger argued that the transcripts were admissible, not to prove that Gilbert's allegations were true, but to show that Chrysler had notice of her complaints no later than November 1994. The trial court agreed, allowing the jury to consider the depositions relative to the Chrysler's notice defense. On appeal, Chrysler neither explains the legal reasoning behind its continuing objection to the admissibility

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[62] *See Morinelli, supra* at 261.

[63] *See Leavitt, supra* at 305.

[64] *See Chmielewski v Xermac, Inc*, 457 Mich. 593, 613-614; 580 N.W.2d 817 (1998).

[65] *See Rickwalt v Richfield Lakes Corp*, 246 Mich. App. 450, 454; 633 N.W.2d 418 (2001).

of this evidence, nor provides any authority to support this point. Even though Chrysler refers to an earlier section of its appellate brief in which it claimed that deposition testimony was inadequate to prove notice, it provided no support for that proposition. Hence, it has abandoned this issue.[66] Further, Chrysler failed to present this issue for appeal by listing it in the questions presented.[67] Regardless, notice to an attorney is notice to the client,[68] making the depositions admissible as relevant,[69] and used for a purpose outside the scope of the definition of hearsay.[70] C. Hnat's Qualifications As An Expert

When Feiger asked the trial court to certify Hnat as an expert so he could render opinions about Gilbert, Armstrong objected, essentially contending that a social worker could not testify as an expert on substance abuse. Feiger, who had Hnat lay a foundation concerning his experience and credentials, argued that Hnat had always been listed in the pleadings as an expert in his field. The trial court agreed with Feiger, allowing him to testify as an expert in "substance abuse care and treatment."

Following trial, Chrysler contended that it was entitled to a new trial or remittitur because Hnat should not have been

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[66] *Palazzola v Karmazin Products Corp*, 223 Mich. App. 141, 156, n 7; 565 N.W.2d 868 (1997).

[67] *See* MCR 7.212(C)(5).

[68] *See Kastle, supra* at 32.

[69] *See* MRE 402.

[70] *See* MRE 801©.

allowed to testify as an expert on matters such as the physical effects of alcohol abuse, including the effect of alcohol on brain chemistry and whether Gilbert was "dying" from alcoholism. The trial court rejected this argument, reasoning that Hnat had sufficient experience and training in the area to testify as an expert, the fact that he was a social worker was not dispositive of his expertise, and the effects of alcohol were sufficiently wellknown to be considered scientific.[71]

MRE 702 primarily governs how Michigan courts treat scientific evidence and witnesses who testify as experts, providing:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. "

MRE 702 requires a trial court to determine the evidentiary reliability of trustworthiness of the facts and data

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[71] The trial court erroneously cited *Daubert v Merrell Dow Pharmaceuticals*, 509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469 (1993) when concluding that the evidence of the effects of alcohol were well-known. This state follows the standards set out in *People v Davis*, 343 Mich. 348, 372; 72 N.W.2d 269 (1955) and *Frye v United States*, 54 App. D.C. 46, 47; 293 F 1013 (1923). *See Nelson v American Sterilizer Co (On Remand)*, 223 Mich. App. 485; 566 N.W.2d 671 (1997); *People v McMillan*, 213 Mich. App. 134, 136; 539 N.W.2d 553 (1995). Chrysler does not challenge the trial court's ruling on this ground, and even cites *Daubert*.

underlying an expert's testimony before that testimony may be admitted."[72] The trial court reached the correct conclusion in allowing Hnat to testify as an expert. Hnat has a master's degree in social work and has a limited license from the state to provide psychological therapy. His practice for many years has specifically focused on substance abusers, giving him opportunities to develop a substantial knowledge about their treatment. Hnat was also able to cite published studies to support his opinions a number of times during his testimony, demonstrating that he had a foundation for his opinions. Chrysler's argument at trial, and again on appeal, amounts to an assertion that only psychiatrists, other medical doctors, and psychologists can render expert opinions. However, to borrow the wording from this Court's opinion in *Grow v WA Thomas Co*,[73] the "mere fact" that Hnat "is not a medical practitioner does not render him unqualified as an expert witness. ...Any limitations in" Hnat's "qualifications are relevant to the weight, not the admissibility, of his testimony."[74] At times, Hnat's testimony appeared to have a medical dimension. However, his testimony suggested that his practice as a social worker had allowed him to observe and learn about these specific effects of substance abuse.[75] At no time did Hnat try to suggest to the jury that he was a medical

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[72] *Nelson, supra* at 491.

[73] *Grow v WA Thomas Co*, 236 Mich. App. 696, 713-714; 601 N.W.2d 426 (1999).

[74] *See also Thames v Thames*, 191 Mich. App. 299, 303; 477 N.W.2d 496 (1991).

[75] *See Phillips v Deihm*, 213 Mich. App. 389, 401; 541 N.W.2d 566 (1995), citing MRE 702.

doctor. He openly admitted sending Gilbert to other practitioners. When Armstrong asked Hnat if he was "able to physically examine Ms. Gilbert to determine if she is dying," he admitted that he could not. In a separate exchange, when Armstrong asked Hnat whether he thought that one of Gilbert's asthma medications was causing her to gain weight, he candidly responded, "It could, [but] I can't speculate. I don't know the exact pharmacology. It's not a centrally acting medication, so I am not as familiar with those." Armstrong also emphasized in her closing argument that Hnat was not a medical doctor. The jury certainly could not be confused about the limits of Hnat's expertise. As for Chrysler's contention that Hnat's testimony that the effects of alcoholism can lead to death was not scientific, it points to no evidence contradicting the trial court's conclusion that this has become common knowledge. This would make Hnat' testimony admissible.[76]

In fact, this Court has held that evidence of physical disease or effect of alcoholism is admissible without questioning its scientific validity.[77] Accordingly, Chrysler has failed to demonstrate that the trial court erred in allowing Hnat to testify as an expert and to provide his opinion in areas that related to substance abuse, but also had a more traditional medical component that overlapped with his expertise. Chrysler also argues that the trial court should have barred Katz's testimony for the same reasons that it should have barred Hnat's testimony as an expert. It has failed to develop its argument to differentiate between Hnat as an expert and

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[76] *See* MRE 702.

[77] *See, e.g., Chmielewski, supra* at 613-614.

Katz as a fact witness. Accordingly, having failed to present an argument or cite any authority that the trial court erred in allowing Katz to testify to the facts surrounding her treatment of Gilbert, Chrysler has abandoned this portion of its argument.[78] Furthermore, to the extent that Katz may have rendered opinions as if she were an expert, Armstrong did not object to any part of her testimony on that basis and actually asked Katz questions that required Katz to render an opinion. "A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute."[79]

D. Excluding A Defense Expert

In the middle of the month-long trial in this case, Armstrong asked the trial court to allow her to call a physician as a medical expert to rebut Hnat's expert testimony, which she did not anticipate. Feiger responded that Hnat was endorsed on the plaintiff's witness list well before trial, allowing Chrysler to prepare its case, but that he would have no opportunity to prepare to examine an expert identified at such a late date. The trial court denied Armstrong's request, first noting that she had yet to put on Chrysler's case-in-chief, which would make the witness a traditional defense witness, not a rebuttal witness. Additionally, the trial court agreed that allowing a new expert to testify at that late date would prejudice Gilbert.

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[78] *See Palazzola, supra* at 156, n 7.

[79] *Dresselhouse v Chrysler Corp*, 177 Mich. App. 470, 477; 442 N.W.2d 705 (1989).

When Chrysler raised this issue again in its post-verdict motions, the trial court reaffirmed its initial decision, explaining that cross-examination was the best way to challenge Hnat's testimony. The trial court, in a footnote, stated:

> Defendant argues that it was late in notifying the Court it would present these witnesses because it had no reason to anticipate that Mr. Hnat's testimony would range over issues of Plaintiff's health and prognosis. But it seems unlikely that a reasonable defendant here would not have anticipated that Plaintiff would try to argue that the current state of her alcoholism was linked to the harassment she had endured; moreover, Defendant knew Plaintiff had a severe alcohol problem, and it is no mystery that heavy drinking can cause death. ...

The trial court did not comment on its conclusion at trial that allowing this late endorsement would cause prejudice to Feiger's ability to present Gilbert's case.

MCR 2.401(I) governs witness lists, providing that a trial court "may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." Case law recommends that trial courts allow unendorsed witnesses to testify at trial as long as the adverse party's rights are protected.[80] Nevertheless, the

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[80] *See Pastrick v General Telephone Co of Michigan*, 162 Mich. App. 243, 245; 412 N.W.2d 279 (1987) ("[t] rial courts should not be reluctant to allow unlisted witnesses to testify where justice so requires, particularly with regard to rebuttal witnesses").

record suggests that the trial court was concerned about the prejudice allowing Chrysler's proposed witness to testify would cause to Gilbert, including delay in the proceedings. The trial court had mentioned its concern about unendorsed witnesses at the outset of trial, asking that "if, in fact, there is going to be a request to call a witness that is not listed on the pretrial order, I want to know about it a couple of days in advance." Further, the trial court seemed disinclined to consider Chrysler's lack of preparation for trial as good cause to grant the motion. Indeed, as Gilbert notes in her brief on appeal, that Hnat would render expert testimony was no surprise to Chrysler; Hnat had been listed as an expert as early as November 16, 1995, more than 3 ½ years before trial. Chrysler was also aware that Gilbert was claiming damages related to "mental anguish," as she had pleaded in her complaint. Why Chrysler failed to secure an expert before trial is not clear. The trial court did allow Katz to testify as a fact witness even though she had not been listed as a witness before trial.[81] Whether Chrysler only discovered the need to find an expert during trial, justifying a late endorsement, is a close question. As a matter entrusted to the trial court's discretion, it is impossible to say that the trial court's ruling was baseless and, therefore, error requiring reversal.

E. Gilbert's Drunk Driving Records

Chrysler contends that the trial court erred in excluding Gilbert's drunk driving record from evidence, "which allowed

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[81] The record suggests that the trial court may have allowed Katz to testify, albeit only as a fact witness, because at least some of the preliminary witness lists revealed that Gilbert intended to call anyone who had treated her, including social workers, and Katz fit in this category.

plaintiff to misrepresent the extent of her recovery from alcoholism before the alleged harassment - a key fact in her theory of damages[.]" The trial court explained its ruling at the time as a reaction to Chrysler's failure to list the document as a proposed exhibit before trial. When Chrysler raised this issue again after the jury rendered its verdict, the trial court emphasized that Chrysler had freely explored Gilbert's driving record at trial even without admitting the exhibit, and its own "laxity" had been responsible for its failure to list the exhibit. Additionally, any error was harmless because the reason a patient enters treatment is not a dispositive indicator of success, and the more important point remains:

> that after entering treatment in 1992 - whether voluntarily or not - Plaintiff was able to achieve a certain level of sobriety, and that her alcohol worsened after she had been subjected to the harassment. It is the fact that the harassment led Plaintiff to drink that is important in linking it to Plaintiff's current medical state.

Clearly, Chrysler made the correct strategic choice to argue to the jury that it could not be certain that Gilbert was on the road to recovery when she started her job in light of the possibility that she had been forced to attend treatment. This court-ordered treatment also called into question Hnat's testimony that Gilbert had a particularly strong will to succeed at recovery. Nevertheless, the trial court articulated a compelling reason for denying the motion for new trial or remittitur in light of its evidentiary ruling: the record leaves no doubt that Chrysler made this argument directly to the jury, informing the jury of the existence of the order and what it perceived to be the flaw in Hnat's estimation of Gilbert's

prospect for success when he started treating her in 1992. Having the documentary evidence of the order would not have proved the point to any greater degree of certainty. Moreover, given that Gilbert admitted to her drunk driving arrests, it is unlikely that this drunk driving record would have shed any additional light on Gilbert's alleged misrepresentation of her degree of recovery. If there was any error in the initial evidentiary ruling, it was harmless, making the trial court's ruling on the postjudgment motion properly within its discretion.

VI. Jury Award A. Standard Of Review

Chrysler contends that the trial court erred in denying its motion for a new trial or remittitur because the jury's award was excessive and out of line with other cases. This Court reviews a trial court's decision to deny a motion for a new trial[82] or remittitur[83] to determine whether it abused its discretion.

B. $21,000,000

When Chrysler raised this issue in its postjudgment motions, the trial court rejected Chrysler's argument that the jury verdict was excessive in comparison to other jury verdicts in sexual harassment cases, instead focusing on a number of issues related to damages that Chrysler does not raise in this appeal. Strictly speaking, the test for remittitur examines whether the evidence submitted to the jury that

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[82] *See Morinelli, supra* at 261.

[83] *See Leavitt, supra* at 305.

decided the case will support the award.[84] While some opinions make fleeting reference to comparable jury awards, the core analysis remains focused on the evidence in the case at bar.[85] Jury awards in different cases involving wholly unrelated facts are not particularly germane to whether the trial court erred in denying remittitur, especially when the awards cited were given many years ago.

It certainly is possible that a different jury would have reacted differently to the evidence in this case and might have given Gilbert a smaller award. However, the jury in this case could have found compelling Gilbert's evidence that she would die an untimely death because of the effects of the harassment that Chrysler knew existed and did nothing to stop. Alternatively, the jury could have found persuasive Gilbert's evidence that her life was and would be completely joyless because the harassment had caused her to develop major depressive and post-traumatic stress disorders, changing the fundamental chemistry in her brain. Hnat also provided testimony explaining the high costs of treatment Gilbert is likely to incur in the future. All these factors, as well as the length of the harassment, might have contributed to the high award. The precise amount of appropriate damages is often an elusive figure that cannot be calculated with simple mathematical equations, which is why the law requires only a reasonable approximation by the jury.[86] That

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[84] *See Anton, supra* at 683, citing MCR 2.611(E)(1).

[85] *See Knight v Gulf & Western Properties, Inc*, 196 Mich. App. 119, 131-132; 492 N.W.2d 761 (1992).

[86] *See Hoffman v Auto Club Ins Ass'n*, 211 Mich. App. 55; 535 N.W.2d 529 (1995); *Body Rustproofing, Inc v Michigan Bell*

the jury exercised its independence by awarding Gilbert only about fifteen percent of the $140,000,000 Feiger said was appropriate suggests that it decided the amount of the award on how it perceived the evidence the parties presented, not because of passion, bias, or misunderstanding. Like the jury, the trial court heard all the evidence and decided that it supported the jury's award. Giving the trial court the deference it is surely due,[87] it is impossible to say that the trial court abused its discretion in reaching this conclusion.

Affirmed.

/s/William C. Whitbeck
/s/E. Thomas Fitzgerald
/s/Jane E. Markey

Telephone Co, 149 Mich. App. 385, 390; 385 N.W.2d 797 (1986).

[87] *See* MCR 2.613©.

APPENDIX G

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

NO. 94-409216-NH
HON. JOHN A. MURPHY

[Dated May 1, 2000]

LINDA GILBERT,	)
Plaintiff,	)
	)
CHRYSLER CORPORATION,	)
Defendant.	)
	)

GEOFFREY N. FIEGER (P30441)
WILLIAM J. McHENRY (P38458)
Attorneys for Plaintiff
19390 West Ten Mile Road
Southfield, Michigan 48075
(248) 355-5555

DAVID J. COOPER (P12203)
Co-Counsel for Plaintiff
5777 W. Maple Road
Suite 130
West Bloomfield, Michigan 48322
(248)932-8582

THOMAS G. KIENBAUM (P15945)
ELIZABETH HARDY (P37426)
Attorneys for Defendant
325 South Old Woodward Ave.
Birmingham, Michigan 48009
(248)645-0000

PATRICIA J. BOYLE (P11084)
Co-Counsel for Defendant
325 South Old Woodward Ave.
Birmingham, Michigan 48009
(248) 645-0000

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR EVIDENTIARY HEARING/RELIEF FROM JUDGMENT/NEW TRIAL, MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AND MOTION FOR A NEW TRIAL AND/OR REMITTITUR

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan, on May 1, 2000

PRESENT: THE HONORABLE JOHN A. MURPHY

Defendant DaimlerChrysler Corporation [hereinafter "Chrysler"] has filed three motions to overturn a $21-million-dollar verdict entered against it in this hostile-environment sexual harassment case. In the alternative, Chrysler argues that the verdict was too large, and should be reduced.

Chrysler argues that the verdict must be overturned because Plaintiff's counsel engaged in persistent misconduct

throughout the trial. The allegations of misconduct center on one witness for the Plaintiff, Stephen A. Hnat, who testified as an expert to link the harassment Plaintiff had suffered to her declining health, specifically her alcoholism and her depression. Defendant further argues that crucial medical records were kept from it. Chrysler also argues that Mr. Fieger engaged in repeated improper appeals to the prejudice and passion of the jury and at times misrepresented the record. Defendant argues as well that this Court made several erroneous evidentiary rulings on admissibility of evidence. Finally, Defendant argues that the substantive law of sexual harassment was misapplied to the evidence that was admitted.

We shall address each of these categories in the order listed in the preceding paragraph, except that we shall leave for last Defendant's contention that the jury awarded an excessive amount of damages as well as Defendant's other arguments concerning the damages award.

THE ALLEGED MISCONDUCT OF MR. FIEGER AND MR. HNAT

Defendant asks for relief from judgment--or in the alternative for an evidentiary hearing or a new trial--because of alleged fraud by Plaintiff's counsel, Mr. Fieger, and Plaintiff's expert, Mr. Hnat. As Defendant stresses, Mr. Hnat was an important witness for Plaintiff. He testified in four days about the state of her health, his treatment of her, and how the harassment she had endured at the hands of Chrysler's employees worsened her alcoholism and led her to develop "major depressive disorder," a serious psychiatric illness. Mr. Hnat testified that Plaintiff's present condition was so serious that she might well die within a year.

Defendant's allegations concerning Mr. Hnat and Mr Fieger can be divided into four categories: (1) that Mr. Fieger and Mr. Hnat deliberately misrepresented the close relationship between them in order to enhance Mr. Hnat's image of impartiality; (2) that Mr. Hnat lied about his credentials; (3) that Mr. Fieger and Mr. Hnat withheld Plaintiff's medical records from defense counsel; (4) that Mr. Fieger and Mr. Hnat misrepresented Plaintiff's willingness to seek treatment for alcoholism in 1992, the year before the harassment began.

Defendant portrays the relationship between Mr. Hnat and Mr. Fieger as long-standing and close. Defendant has submitted the affidavits of several personnel attesting to Mr. Fieger's close involvement as Plaintiff's counsel in a negligence suit Plaintiff and his then-wife brought, as well as the affidavit of a lawyer describing Mr. Hnat's role as Mr. Fieger's assistant in another case. Defendant argues that Mr. Hnat himself admitted the close association in a television interview he gave in April 1999--before the instant case was tried--in which he described knowing Mr. Fieger since the late 1980s and participating with him in numerous important trials, including 16 or 17 cases that resulted in verdicts in the multi-millions. Defendant has attached a Friend of the Court document apparently based on information Mr. Hnat gave a domestic referee in which Mr. Hnat labeled Mr. Fieger's firm his "principal employer" and described some two months at Mr. Fieger's side in the well-known "Jenny Jones" case resulting from the shooting of a guest on the Jenny Jones show by another guest. Defendant points to the fact that it was Mr. Fieger who represented Mr. Hnat in the latter's divorce.

As Defendant sees it, all these bits of evidence make a mockery of Mr. Fieger's claim during trial that "any personal

relationship [Mr. Hnat] has had with [Mr. Fieger] in these last two years . . . ha[s] nothing to do with the *Gilbert* case whatsoever, and . . . is totally coincidental." Defendant argues that Mr. Hnat's testimony during trial that his primary employment is as a psychiatric social worker and that he spends at least as much time in work not related to Mr. Fieger's firm as in work related to the firm likewise must be assumed to be deliberate lies in light of the above evidence.

However, it is not all that clear to this Court that Defendant is presenting the full picture of the relationship between Mr. Fieger and Mr. Hnat. How to describe a relationship between two people inevitably calls for a subjective judgment: "closeness" is in the eye of the beholder. Thus, Defendant sees the relationship between Mr. Fieger and Mr. Hnat as "close" in part because Mr. Hnat has participated in so many "important" trials that Mr. Fieger was counsel in. However, when Plaintiff focuses on these trials, she delves into the details of many of the trials to show, as she sees it, that Mr. Hnat played a relatively minor role in many of them. For instance, Plaintiff points out that many of the consultations on cases were informal in nature in which Mr. Fieger would get on the telephone to ask for Mr. Hnat's "gut reaction." It is a question whether the glass is half-full or half-empty.

But there is a much more fundamental problem with Defendant's arguments here. The information concerning Mr. Fieger and Mr. Hnat's relationship would have been readily discoverable before trial; at trial, Defendant could have brought the information out during cross-examination. If Defendant now fears that the jury accorded too much impartiality to Mr. Hnat and his testimony, then the Defendant has itself to blame. We note that when a party

moves to set aside a verdict under MCR 2.612 and 2.611 because of perjury--as Defendant moves here--"such perjury should warrant relief from judgment only if it could not have been discovered and rebutted at trial by the exercise of due diligence." *Stallworth v. Hazel*, 167 Mich. App. 345, 356 (1988); *see also Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 261 n.18 (1944) ("While perjury is a fraud upon the court, the credibility of witnesses is in issue, for it is one of the matters on which the trier of fact must pass in order to reach final judgment. An allegation that a witness perjured himself is insufficient because the materiality of the testimony, and the opportunity to attack it, was open at the trial.").

Because Defendant premises its case for a new trial precisely on matters that, assuming due diligence on its part, it should have pursued at trial, we cannot grant it a new trial here. Nor can we grant it an evidentiary hearing: even were Defendant to prove its allegations at such a hearing, it could not gain relief for the type of misconduct it claims. Any hearing would thus be futile. *See Parlove v. Klein*, 37 Mich. App. 537, 545 (1972) (dispensing with evidentiary hearing when even if court found for moving party "such a finding would not justify granting a new trial").[1]

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[1] Defendant cites the *Parlove* case, along with other cases, *see* Motion for an Evidentiary Hearing, Relief from Judgment, and a New Trial Based on Fraud by Plaintiff's counsel and a Witness at 17, for the proposition that allegations of fraud necessitate a new trial. Defendant ignores the following language in *Parlove*:

> In the instant case, however, we see little reason for expending court time on such an evidentiary hearing. Even if the trial court were to determine, after a full evidentiary

Mr. Hnat's Professional Credentials

Defendant argues that Mr. Hnat gave a false picture of his professional credentials to the jury when he testified that he possessed the expertise of a psychologist and psychiatrist, that he had received the Pillsbury Award for his honors thesis, and that he had a Masters Degree in "psycho-biology" from the University of Michigan.

Plaintiff responds by admitting that Mr. Hnat made a mistake when he stated that he had won the Pillsbury Award and by arguing that even if he did not formally receive a Masters Degree from the University of Michigan he did accomplish the work necessary for such a degree.

The discrepancies between Defendant's and Plaintiff's versions of Mr. Hnat's educational achievement do not strike us as large. *See Badalamenti v. William Beaumont Hosp.-Troy*, 237 Mich. App. 278, 290(1999) (stressing that court must determine whether improper conduct of attorney was harmless). We note that while Mr. Hnat may have claimed expertise akin to that of a psychologist or psychiatrist he never maintained that he was a psychologist or psychiatrist; while he may not have formally attained the degree he claimed, he did do the course work for it and thus acquired the requisite knowledge.[2] Most important, as with the

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hearing, that defendant did, in fact, have the narcotics book, such a finding would not justify a new trial.

37 Mich. App. at 545.

[2] Indeed, in a supplemental brief, Plaintiff shows that Mr. Hnat teaches in the addiction studies program at the University of Detroit

question of Mr. Fieger and Mr. Hnat's relationship, Defendant has itself to blame for not bringing any discrepancies with respect to Mr. Hnat's professional credentials to the jury's attention. Surely the most effective way to highlight what Defendant sees as Mr. Hnat's pattern of deception would have been to confront him on cross. *See Sanfelice v. Dominick's Finer Foods, Inc.*, No. 94 C 0727, 1995 WL 608602, at *1(N.D. Ill. Oct. 13, 1995) (refusing to bar the testimony of a witness trained in psychotherapy but without a psychology degree and holding that the lack of a degree goes to the testimony's weight, and is a factor to be brought out on cross). We note that as a general rule non-disclosure by either a party or the party's counsel does not suffice to make out a case of fraud upon the court, such fraud being limited to cases of wrongful conduct of an entirely different magnitude, such as bribery. *See* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, sec. 2870, at 416-19 (1995); *cf. Greiner v. City of Champlin*, 152 F.3d 787, 789 (8th Cir. 1998).

The Alleged Concealment of Medical Records

Defendant argues that Plaintiff, Mr. Fieger, and Mr. Hnat engaged in a "scheme" to deprive Defendant of crucial parts of Plaintiff's medical records. As Defendant sees it, without these concealed documents, it was deprived of an effective opportunity to highlight crucial issues at trial, such as

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Mercy. A letter from a professor in that program, Dr. John Franklin, attests to Plaintiff's "good understanding of psychopharmacology" and terms Plaintiff an expert "in the area of psycho-biology." *See* Exh. 2, Supplement to Plaintiff's Brief of Law in re the Defense Motion for an Evidentiary Hearing.

Plaintiff's willingness to seek treatment and how this willingness correlated with the harassment she experienced.

The problem with this set of arguments again lies with Plaintiff's own diligence in discovery and trial preparation. The parties here appear to have disagreed with the wording of the authorization designed to produce at least some of the records at issue. Unfortunately, Defendant never brought a motion to compel to resolve this dispute. Similarly, with respect to the other sets of records, Defendant seems to have made only half-hearted efforts to obtain them. Indeed, the record shows that some of the records allegedly hidden by Plaintiff do not even exist. *Compare* Defendant's Brief for Evidentiary Hearing at 13 & n.15 (alleging that records of 1989 treatment at Herman Kiefer were withheld) *with* Plaintiff's Exh. 6, Response to Motion for Evidentiary Hearing (information request reply from Herman Kiefer dated December 16, 1999, stating that Plaintiff never treated at Herman Kiefer).[3]

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[3] The illustration drawn from Herman Kiefer highlights another problem With Defendant's argument: harmless error. The records from Herman Kiefer are from 1989. Common sense suggests that the important date in the time line of Plaintiff's disease here is 1992: this was the year Plaintiff began working at Chrysler, and we need to know how well she was doing then so that we can gauge what impact the subsequent harassment had on her, and her disease. How she was doing in 1989 is undeniably of some relevance here, but it seems of only marginal relevance in determining how she was doing three years later, in 1992. If records from 1989 were unfairly withheld from Defendant, the resulting error would seem harmless, thus. To put it another way, we doubt that any failure to disclose the records impeded Chrysler's ability to fully and fairly present its case.

As Plaintiff points out, *see* Plaintiff's Brief of Law in Opposition to Motion for Evidentiary Hearing/Relief from Judgment/New Trial at 17, Defendant here appears to have piggybacked on Plaintiff's own efforts to obtain records. Thus Defendant complains that it relied on a representation that Mr. Fieger had made at a pre-trial conference concerning the completeness of the records. *See* Motion for an Evidentiary Hearing, Relief from Judgment, and a New Trial Based on Fraud by Plaintiff's Counsel and a Witness at 13. Defendant ignores the fact that it had an independent responsibility to secure for itself the complete set of records. *Cf. Diaz v. Methodist Hosp.*, 46 F.3d 492, 497 (5th Cir. 1995) (concluding under Fed. R. Civ. P. 60(b)(3) that appellant had not shown that she was deprived of an opportunity to "fully and fairly present her case" when she alleged that other party had committed perjury but she failed to show that a "more focused effort" on her part would not have uncovered the true information). Defendant argues that it had difficulty in obtaining authorizations and the like; but, if so, its remedy was to bring a timely motion to compel. We find it significant here that in making its argument concerning Plaintiff's alleged improper withholding of records, *see* Motion for an Evidentiary Hearing, Relief from Judgment, and a New Trial Based on Fraud by Plaintiff's Counsel and a Witness at 11-14, Defendant refers to no discovery orders of this Court. *See also* Affidavit of Johanna H. Armstrong, Exh. K, Motion for an Evidentiary Hearing, Relief from Judgment, and a New Trial Based on Fraud by Plaintiff's Counsel and a Witness (describing efforts Defendant made to obtain records and omitting any reference to motions to compel); *cf. Mink v. Masters*, 204 Mich. App. 242 244-45 (1994) (permitting sanction of default judgment for discovery abuse where party seeking records had filed a motion to compel and two follow-up motions, and offending party had failed to comply with

any of the resulting court orders). We thus reject Defendant's argument about withheld records.

The Alleged Misrepresentation of Plaintiff's Willingness to Seek Treatment

Defendant argues that an examination of Plaintiff's driving record shows that Mr. Fieger and Mr. Hnat falsely stated that Plaintiff willingly sought treatment for her alcoholism before the harassment at Chrysler began.

What Defendant wants to focus on is Mr. Fieger's statement that in February 1992, when Plaintiff began seeing Mr. Hnat, she was not under any legal compulsion to do so. Defendant argues that her driving record shows that the district court actually had ordered Plaintiff to seek outpatient treatment prior to February 1992 and thus she was anything but a voluntary patient when she submitted to treatment with Mr. Hnat in February 1992.

However, once more Defendant's own laxity appears to be the chief culprit for why this issue never made it to the fact-finder. Defendant points to what Mr. Hnat and Mr. Fieger said, but the fact remains that Defendant never listed the driving record in its list of exhibits in the final pretrial order. As Plaintiff points out, Defendant never moved to amend the pretrial order before trial to list the driving record. If Defendant did not list the record, then-the level of cooperativeness Plaintiff exhibited in producing the record made no difference: it could not have presented it at trial to highlight the alleged falsity of Mr. Fieger and Mr. Hnat's presentation of Plaintiff's willingness to enter therapy.

Accordingly, for the reasons set forth *supra*, we must deny Defendant Chrysler's motion for an evidentiary hearing, relief from judgment, or a new trial based on Plaintiff's Counsel's and a witness's fraud.

Plaintiff's Counsel's Alleged Misstatements

Besides the allegedly fraudulently misstatements by Mr. Fieger discussed *supra*, Defendant also points to alleged misstatements by Mr. Fieger concerning the substantive issues of the case, e.g., whether Chrysler had taken action to combat the harassment Plaintiff was subjected to, or whether Plaintiff had taken steps herself to combat it. According to Defendant, although these statements were a feature of the entire trial, they were especially predominant in closing argument. To aid our analysis, we divide these alleged misstatements into two categories: (1) Mr. Fieger's allegedly excessive use of hyperbole; and (2) Mr. Fieger's alleged exhortation to the jury to punish Chrysler by awarding punitive damages.

1. Mr. Fieger's Alleged Use of Hyperbole

Under Michigan law, comments by an attorney do not mandate reversal unless such comments indicate a deliberate course of action by the attorney to inflame the jury and to divert its attention from the matters at hand. *See Hunt v. Freeman*, 217 Mich. App. 92 (1996). We find it difficult to conclude that Mr. Fieger's allegedly improper comments diverted the jury from the issues at hand since the comments to which Defendant objects go to the core of the case. To take just one example, Defendant objects to his saying that Plaintiff has been exposed to a "living hell" by the harassment. Obviously, the quality of the harassment and its impact on Plaintiff were directly relevant; indeed, one of

Defendant's arguments in support of a new trial is precisely that the harassment Plaintiff faced was not severe enough to support the verdict, *see* text *infra*.

Admittedly, Mr. Fieger--particularly in closing argument--made very forceful statements, using very strong language, about the issues in this case. But as the "living hell" comment exemplifies, these statements cannot be labeled "misstatements" or lies, as Defendant would label them; they incorporate opinions and subjective judgments that cannot simply be labeled "true" or "false." *Cf. Kern v. St. Luke's Hosp. Ass'n*, 404 Mich. 339 (1978) (calling for new trial when plaintiff s counsel had apparently made up allegation that defense witnesses were involved in conspiracy to conceal the truth).[4] Was Plaintiff subjected to a "living hell"? Some people might say yes; others would say no. But while strongly worded, such statements do not seem to meet the standard for being prejudicial or inflammatory when they directly address the merits of the case. *See Badalamenti v. William Beaumont Hosp.-Troy*, 237 Mich App. 278, 292 (1999) (attacking

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[4] In fairness to Mr. Fieger, we must note that Defendant does a rather unconvincing job of playing dumb with respect to his rhetoric. For instance, Defendant objects to the fact that Mr. Fieger portrayed Chrysler as having done "zero" with respect to protecting Plaintiff from the harassment. Any reasonable listener would understand that Mr. Fieger did not mean that Chrysler had done literally nothing; what he meant was that compared to what the company could and should have done, it as good as did nothing. Jurors are presumed to be intelligent people who can understand the spirit in which statements are made.

counsel's statements when they "divert[ed] the jury's attention from the merits of the case").[5]

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[5] Moreover, to paraphrase a writer's words about a Particularly acerbic critic, this might be a case in which venom serves as its own toxin, so to speak. If a lawyer peppers her statements to the jury with incendiary and exaggerated references and comparisons, she risks alienating the jury. Unfounded comparisons and the like will lead jurors to discount not only the comparisons themselves but everything else the lawyer says. *See, e g.*, Laurie G. Kirszner & Stephen R. Mandell, *The Holt Handbook* 345 (5th ed. 1999) ("Carelessly used... overstatement can make your ideas seem inappropriately exaggerated...."); James H. Seckinger, *Closing Argument*, 19 Am. J. Trial Advoc. 51, 54 (1993) ("Closing argument should not be an appeal to sympathy, prejudice, or emotion in general.... Judges and jurors usually cannot be fooled and will recognize an appeal to emotion for what it is."). To this extent the problem that defense counsel focuses on is largely self-correcting. Now, as the case law suggests with the distinction it makes, the story might be different if a lawyer is allowed to inject entirely new matters into the case.

We note that the self-correcting nature of the problem becomes especially strong for allusions to important historical events; at oral argument, counsel for defense alleged that plaintiff's counsel had gone to the extent of equating what Linda Gilbert suffered to what the Jews suffered at the hands of the Nazis during World War II, the implication being, according to defense counsel, that Chrysler was equated to the Nazis. The public in general, n0£ only people who lost relatives during the Holocaust, might be deeply offended by such comparisons. *Cf.* Stephen L. Carter, *The Culture of Disbelief* 95 (1993) (discussing controversy over making comparisons between historical atrocities like slavery and the Holocaust).

Moreover, we must note that Defendant's arguments in its brief do delve, in depth, into the purportedly improper statements, but do not discuss what objections were made to these statements. In this respect, Defendant's argument is deficient because Defendant needs to show that it timely objected to the statements. *See Janda v. City of Detroit*, 175 Mich. App. 120, 131 (1990), *lv. app. denied*, (Mich. Apr. 18, 1990); *Barnes v. B&V Constr., Inc.*, 137 Mich. App. 595, 599 (1984), *lv. app. denied*, (Mich. June 25, 1985).

2. Mr. Fieger's Alleged Exhortation to the Jury re Punitive Damages

Defendant does not claim that Mr. Fieger actually used the term "punitive damages" in closing argument. Instead, Defendant argues that Mr. Fieger all but used the term when he exhorted the jury in terms like "ring the bell." Defendant argues that such language means that Mr. Fieger was urging the jury to "punish" Chrysler, i.e., to award Plaintiff punitive or "symbolic" damages. *See, e.g.*, Reply in Support of Motion of Defendant DaimlerChrysler Corporation for a New Trial and/or Remittitur at 9 ("While this is a 'civil rights case, plaintiff license to make a blatant plea for punitive--i.e., symbolic--damages...." (citation omitted)); Motion of Defendant DaimlerChrysler Corporation for a New Trial and/or Remittitur at 5 ("In other words, plaintiff's counsel asked the jury to send a message to DaimlerChrysler, Germany, and apparently the world by rendering a 'loud,' 'clear,' and 'high' award of what can only be characterized as punitive damages.").

What Defendant overlooks is that any type of verdict--one that includes punitive damages as part of the damages award as well as one that does not--has symbolic value--"rings the

bell," to use Mr. Fieger's figure of speech. *See* Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 Iowa L. Rev. 465, 472-73 (1997) (discussing the "symbolism of a jury verdict"). In other words, the jury rang the bell here when it awarded Plaintiff her compensatory damages. Defendant's assumption that "symbolic" equals "punitive" is strictly its own interpretation.

There was no space on the verdict form for the jury to award punitive damages. The jury was instructed to award Plaintiff damages to compensate her for the harm she had suffered from the harassment. There is no evidence here to believe that the jury did anything but award compensatory damages.

MISCELLANEOUS EVIDENTIARY ISSUES

We now turn to those evidentiary issues that are largely independent of the alleged wrongdoing of Plaintiff's counsel and Plaintiff's expert.

Mr. Hnat's Expert Testimony

Besides its veracity, Mr. Hnat's testimony also is attacked by Defendant on account of its purported false sheen of expertise. Defendant argues that when Mr. Hnat stated things like Plaintiff's brain chemistry had been altered or the harassment had "fatigue[d]" her brain, he was testifying about scientific matters despite the fact he failed to invoke "recognized scientific . . . knowledge" per MRE 702 (and *Daubert*).

We believe that Defendant imposes an unfair burden on Plaintiff here. While we do not deny the influence and broad reach of the U.S. Supreme Court's opinion in *Daubert*, we maintain that *Daubert* does not stand for the proposition that whenever any witness testifies about scientific matters--like human physiology, and body chemistry and brain functioning --the testimony must first be run through the entire *Daubert* gauntlet. Indeed, *Daubert* itself emphasized that the inquiry into the admissibility of expert evidence is a flexible one: "The inquiry envisioned by Rule 702 is, we emphasize, a flexible one." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 594 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) ("[A]s the Court stated in *Daubert*, the test of reliability is 'flexible,' and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case."); Note, *Navigating Uncertainty: Gatekeeping in the Absence of Hard Science*, 113 Harv. L. Rev. 1467 (2000) (defining two "paradigmatic" expert-evidence cases--the slip-and-fall and the toxic tort--and, after concluding that each calls for different approaches to gatekeeping, arguing that a court must determine where the facts before it fall on the continuum between the two); Recent Case, 112 Harv. L. Rev. 719, 724 (1999) (noting that differing opinions on how to apply *Daubert* "follow[] not as much from the intrinsic quality of...evidentiary bases, as from each side's perception of the essential nature of the case" and recognizing the danger of viewing every case through the prism of the "paradigm of the mass toxic tort").

It is well known within the scientific and medical community that alcohol causes changes in the body's physiology, including in the chemistry of the brain, and that long-term use and abuse cause changes, ones that endure even

after a person has "sobered up." Recognizing this, courts have accepted a witness's education and experience as sufficient to show the reliability of testimony on the effects of alcohol. *See Benedi v. McNeil P.P.C., Inc.*, 66 F.3d 1378, 1383-84 (4th Cir. 1995) (rejecting argument that *Daubert* required epidemiological data to show that alcohol combined with drug caused liver damage); *Carter v. Fenner*, 136 F.3d 1000, 1012 (5th Cir.) (holding that coroner with experience with intoxicated people was qualified to testify about the behavior of people under the influence), *cert. denied*, 525 U.S. 1041 (1998); *Volk v. United States*, 57 F. Supp. 2d 888, 893-96 (N.D. Cal. 1999) (rejecting argument that trial court abused its discretion in not holding *Daubert* evidentiary hearing and relying instead on "specialized knowledge and experience" of police officer with respect to how people under the influence behave). Just as the experts in *Volk* and *Carter* were allowed to testify about the short-term effects of alcohol based on their knowledge and experience, so Mr. Hnat here was allowed to use his knowledge and experience to testify about the long-term effects. *See Kumho Tire*, 526 U.S. at 150 ("[T]he relevant reliability concerns may focus upon personal knowledge or experience."). And as someone who teaches about substance abuse and has treated alcoholics, Mr. Hnat is certainly familiar with alcohol's effects, both short-term and long-term.[6] We do not believe that at this date

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[6] Defendant would argue that a "social worker" like Mr. Hnat had no business testifying about medical matters such as the condition of Plaintiff's pancreas.

There are all sorts of social workers. Labeling Mr. Hnat a social worker, while not necessarily inaccurate, does little to tell us about the range of his knowledge and training. *See Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir.) ("The issue with regard to

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expert testimony is not the qualifications of the witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question."), *cert. denied*, 513 U.S. 1111 (1995); *cf. Sanfelice v. Dominick's Finer Foods, Inc.*, No. 94 C 0727, 1995 WL 608602, at *1 (N.D. Ill. Oct. 13, 1995) (testimony of witness with sufficient education but lacking degree admissible). As we have discussed above when addressing Defendant's contention that Mr. Hnat misrepresented his credentials, we believe that Mr. Hnat can fairly claim to have some expertise in the medical effects of alcohol abuse on the body, certainly sufficient expertise to testify to such things like the pain involved in pancreatitis, *see* Motion of Defendant DaimlerChrysler Corporation for a New Trial and/or Remittitur at 9--a condition, we note, that often occurs in alcoholics.

Besides, focusing on Mr. Hnat's title--"social worker"--ignores the "flexible" approach *Daubert* embodies. *See* text *supra*. Above all, *Daubert* asks that we be flexible enough to evaluate the validity of the technique employed, and how that technique fits the facts at hand, *see Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1312 (11th Cir. 1999); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 743 (3d Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995). The importance of these two tasks--and the need to perform them flexibly--can be shown through comparing the facts of the instant case with those of a case Defendant relies on, *Nelson v. American Sterilizer Co.*, 223 Mich. App. 485 (1997). *See* Motion of Defendant DaimlerChrysler Corporation for a New Trial and/or Remittitur at 9.

In the instant case, broadly speaking, we are attempting to determine the course of Plaintiff's alcoholism. It is intuitively plausible that someone like Mr. Hnat, who is both educated about substance abuse and experienced in treating people with substance abuse problems, would be qualified to testify about the current state of Plaintiff's alcoholism, even about what stage of the disease

and time Plaintiff should have to start from Square 1 to "prove" the widely accepted proposition that excessive ingestion of alcohol over a long period affects brain functioning. *See id.* at 152 (noting that trial judge needs the

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Plaintiff was in and what her longevity might thus be presumed to be. *See* MRE 702; *Phillips v. Deihm*, 213 Mich. App. 389, 401 (1995) ("A person may be qualified to testify as an expert witness by virtue of the person's knowledge, skill, experience, training, or education in the subject matter of the testimony."). As someone who has observed alcoholics through his treatment of them, Mr. Hnat might be able to conclude such things simply from Plaintiff's appearance, his knowledge of how long and how much she has been drinking, and so on. We emphasize that none of this should be taken to imply that Plaintiff's case would not have been stronger had a medical doctor testified on Plaintiff's behalf. But the question is not whether Plaintiff made out an ideal case but whether she made out a case that was sufficiently strong such that a reasonable fact-finder could find in her favor. *Cf. Paoli*, 35 F.3d at 744 ("The grounds for the expert's opinion merely have to be good, they do not have to be perfect")

In *Nelson*, in contrast, the scientific question before the court was much more esoteric: whether a chemical, ethylene oxide, could cause steatohepatitis in humans exposed to low but chronic levels. *See Nelson*, 223 Mich. App. at 487. It is hard to see how any social worker, even one who had worked with people who had developed steatohepatitis, could help answer such a question. Indeed, one would think that many doctors as well might be of little help in answering it.

Incidentally, Defendant also attacks the contribution of another social worker who testified for Plaintiff. As Defendant frames the argument, it is based on the same premises by which Defendant finds Mr. Hnat's testimony insufficiently "scientific" to warrant admission. We thus do not address this argument separately.

flexibility "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the-less usual or more complex cases where cause for questioning the expert's reliability arises").

Defendant argues that it was unfairly prevented from offering rebuttal testimony about Mr. Hnat's view of Plaintiff's medical condition and prognosis. However, Defendant overlooks the fact that this testimony was excluded not because of lack of relevance but because Defendant had not listed experts in the final pre-trial order.[7] If only inadvertently, though, Defendant highlights the better approach to assessing Mr. Hnat's testimony here--not to exclude it but to present witnesses to attack it. If Defendant failed to present such witnesses, it has only itself to blame. *Cf. Daubert*, 509 U.S. at 526 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

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[7] Defendant argues that it was late in notifying the Court it would present these witnesses because it had no reason to anticipate that Mr. Hnat's testimony would range over issues of Plaintiff's health and prognosis. But it seems unlikely that a reasonable defendant here would not have anticipated that Plaintiff would try to argue that the current state of her alcoholism was linked to the harassment she had endured; moreover, Defendant knew Plaintiff had a severe alcohol problem, and it is no mystery that heavy drinking can cause death. Defendant links this part of its argument to Plaintiff's alleged withholding of medical records, *see* Reply in Support of Motion of Defendant DaimlerChrysler Corporation for a New Trial and/or Remittitur at 9, but we have rejected Defendant's contention that it deserves relief because Plaintiff withheld records elsewhere.

Plaintiff's Driving Record

Defendant argues that this Court unfairly limited what portions of Plaintiff's driving record could be placed before the jury.

As Plaintiff points out, it is not accurate to say that Defendant was not allowed to explore Plaintiff's driving record. In fact, Defendant's cross-examination of Mr. Hnat went into detail about Plaintiff's history of problems with the law resulting from her problem with alcohol.

It is true that Defendant was not permitted to inquire into Defendant's pre-1993 driving record. But the reason Defendant insists such inquiry was important--that it would have provided evidence to counter Mr. Hnat's representation that Plaintiff had voluntarily entered treatment in 1992, *see* Reply in support of Motion of Defendant DaimlerChrysler Corporation for a New Trial and/or Remittitur at 10--was discussed *supra*, where we noted that Defendant's own laxity in listing exhibits appears to be responsible for many of its problems with respect to the missing records. Moreover, we note that any improper exclusion of part of the driving record would appear to be harmless error. Defendant places much stress on whether Plaintiff voluntarily entered treatment in 1992, and voluntarily entering treatment is some indication of whether the treatment will prove successful. But it is not a dispositive indicator of success, and the more important point remains" that after entering treatment in 1992--whether voluntarily or not--Plaintiff was able to achieve a certain level of sobriety, and that her alcoholism then worsened after she had been subjected to the harassment. It is the fact that the harassment led Plaintiff to drink that is important in linking it to Plaintiff's current medical state.

The Union Grievance Procedure

Finally, Defendant argues that we erred in refusing to admit evidence that a union grievance procedure was available to Plaintiff, and Plaintiff had never invoked it. However, this argument misconstrues sexual harassment law. An employer is liable for sexual harassment when the employer has knowledge--either actual or constructive--about the harassment and fails to respond adequately to it. Once knowledge on the part of the employer is shown, the inquiry shifts to how the employer responded. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998) (concluding for harassment by supervisor that " [i]f the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so"); *id* at 807-08 ("[W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense."); *Kunin v. Sears, Roebuck & Co.*, 175 F.3d 289, 293 (3d Cir.)(concluding for harassment by co-worker that "liability exists where the defendant knew or should have known of the harassment and failed to take prompt remedial action"), *cert. denied*, 120 S. Ct. 398 (1999).

Arguably, the existence of a grievance procedure is relevant here in that if one existed, and if Plaintiff failed to make use of it, one can argue that Plaintiff's failure shows that the harassment was not that pervasive or severe. The theory is that the worse the harassment, the more likely the victim will make use of any and all avenues of relief.

However, this link between the use of the union procedure and the severity of the harassment is weak. *Cf. Cuesta v. Texas Dep't of Criminal Justice*, 805 F. Supp. 451, 460 (W.D. Tex. 1991) (holding that evidence plaintiff did not use internal procedures to seek redress from harassment "did not reflect poorly on her credibility" when she soon made complaints to both the EEOC and the state). There was plenty of evidence presented that touched much more directly on the severity of the harassment.

Moreover, introducing the union grievance procedure entailed substantial risk of confusion, as the jury might have confused the union procedures with Defendants's when assessing the adequacy of the latter. The resulting confusion would be all the more damaging here, given that the adequacy of Chrysler's procedures was a crucial issue. Besides, focusing on the procedures provided by the union risked substantial prejudice to the Plaintiff, as the jury might well have judged the reasonableness of her actions by whether or not she had utilized the union procedures. *Cf. Rancour v. Detroit Edison Co.*, 150 Mich. App. 276, 291 (1986) (upholding decision of trial judge not to admit arbitration decision in disability-discrimination case, because of danger of prejudice: "[T]he jury might be unduly influenced by the arbitration."), *lv. app. denied*, 428 Mich. 860 (1987). Again, Defendant Chrysler should not be allowed to escape liability here by arguing that a third party--the union--provided adequate means of redress. Even assuming the marginal relevance of the union grievance procedures, evidence of them was properly excluded pursuant to MRE 403. *See Roulston v. Tendercare* (Michigan), Inc., No. 208342, 2000 WL 14193 (Mich. Ct. App. Jan. 11, 2000) ("Relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice,

confusion of the issues, waste of time, or risk of misleading the jury.").[8]

WHETHER PLAINTIFF ESTABLISHED THE ELEMENTS OF A HOSTILE ENVIRONMENT CLAIM

The third motion by Defendant we consider--Defendant's motion for judgment notwithstanding the verdict--focuses on the substantive law of a hostile-environment sexual harassment claim. Here Defendant does not argue, as in its other motions, that certain evidence should or should not have

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[8] One of the factors to consider in the MRE 403 weighing of probative value vs. prejudice is whether there are alternative means of showing what the evidence is offered for. *See McDonald v. Stroh Brewery Co.*, 191 Mich. App. 601, 608 (1991) (excluding "cumulative" evidence via 403), *lv. app. denied*, 439 Mich. 1012 (1992). In the instant case there was such evidence--the attempts Plaintiff made to seek relief from her employer. As one federal court recently noted, Justice Souter, in speaking of the employee's duty to seek other avenues of relief in *Faragher*, spoke of "fail[ing] to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise," *Faragher*, 524 U.S. at 765. Justice Souter's use of "otherwise" indicates that there are several ways that the employee can satisfy the duty. Thus, the court found that there was a genuine issue of material fact over whether an employee had satisfied the duty when the employee had not complained to her employer but had utilized the union-grievance procedure instead. *See Green v. Servicemaster Co.*, 66 F. Supp. 2d 1003, 1013-14 (N.D. Iowa 1999). Here we have the opposite situation: the employee made use of the employer's avenue of redress but not the union's. Still, the principle holds: by using at least one of the avenues of relief available, she met the duty. Given that evidence of the union-procedure would then have been superfluous as well as prejudicial, it was proper to exclude it.

been admitted, but instead argues that even on the evidence admitted Plaintiff failed to establish the necessary elements of a hostile-environment claim.

Defendant's various arguments--that Plaintiff did not report all the incidents of harassment, that Plaintiff was never able to tell Defendant who was harassing her, and so on--fail because Defendant misconceives the duty that an employer has to protect its employees against harassment.[9]

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[9] Often--as the parties do here--the issue of duty is subsumed under the rubric of "notice." Notice is important in establishing an employer's liability for hostile-environment sexual harassment because "an employer may avoid liability under the CRA 'if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment.'. . . [T]he duty to investigate arises only if the employer has actual or constructive notice of the alleged offensive environment." *Grow v. W.A. Thomas Co.*, 236 Mich. App. 696, 702-03 (1999) (quoting *Downer v. Detroit Receiving Hosp.*, 191 Mich. App. 232, 234 (1991)). *See generally Jones v. USA Petroleum Corp.*, 20 F. Supp. 2d 1379, 1385 (S.D, Ga. 1998) ("[T]he new keystone to a sexual harassment claim is notice.").

Given the influence of federal civil rights law on Michigan civil rights law, *see, e.g., Rourk v. Oakwood Hosp. Corp.*, 458 Mich. 25,32 (1998), it is important to point out that federal law now makes a distinction between notice of co-worker harassment and notice of supervisor harassment. Under federal law, an employer is liable for harassment perpetuated by a supervisor that does not result in a tangible employment action unless it can show that it acted promptly and reasonably to respond and prevent the harassment or that the employee failed to take reasonable steps to inform the employer of the harassment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). An employer is liable for

Like many other duties to protect, the duty to protect against harassment is not merely reactive but anticipatory: that is, once an employer has notice that sexual harassment is occurring in the workplace, he has a duty to take steps to prevent future anticipated harassment. *Chambers v. Trettco, Inc.*, 232 Mich. App. 560, 565 (1998) (discussing duty of employer to "exercise[] reasonable care to *prevent* and correct promptly any sexually harassing behavior" (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998)(internal quotation marks omitted) (emphasis added))); *Sharp v. City of Houston*, 164 F.3d 923, 931 (5th Cir. 1999) (holding employer liable for harassment of female police officer even though employer had no notice officer was being harassed where employer did have notice that harasser "might be a problem"); *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 784 (10th Cir. 1995) (holding that "constructive notice" of harassment of plaintiff can be established when

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harassment perpetuated by the co-worker if the employer knew or should have known about the harassment and failed to respond appropriately. *See id.* at 799-800; *see also Fenton v. HiSAN, Inc.*, 174 F.3d 827, 829 (6th Cir. 1999).

It is unclear if Michigan has explicitly incorporated this distinction. *See Grow*, 236 Mich. App. at 703 (.quoting with approval the *Faragher* Court's formulation of employer liability for supervisor harassment but not mentioning the co-worker formulation). However, under both formulations the concepts of constructive and actual notice both matter. *See Curry v. District of Columbia*, 195 F.3d 654, 665 n.l, 668 (D.C. Cir. 1999) (per curiam) (separate opinion of Wald, J.); Note, *Notice in Hostile Environment Discrimination Law*, 112 Harv. L. Rev. 1977, 1979-80(1999). Importantly, Michigan law also adopts the notion of constructive notice. *See, e.g., Grow*, 236 Mich. App. at 703.

employer knew harasser had harassed other women in the past); Note, *Notice in Hostile Environment Discrimination Law*, 112 Harv. L. Rev. 1977 (1999). The employer may be held liable if he acts unreasonably in not foreseeing what harassment may occur in the future and in not taking reasonable steps to combat such foreseeable harassment.[10]

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[10] It might fairly be said that Defendant refuses to admit that the concept of constructive notice exists. For instant, in a supplemental brief, Defendant asserts that "without notice from plaintiff, it had no way of knowing about such harassment, and, at trial, plaintiff made no attempt to prove otherwise." Reply in Support of DaimlerChrysler Corporations's Motion for Judgment Notwithstanding the Verdict at 4. Defendant's implicit assumption here is that for Plaintiff to have a legitimate expectation that Chrysler would protect her from a particular act of harassment, Plaintiff had to inform Chrysler of that particular act. Compare this view with that, say, of the Court in *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 673 (10th Cir. 1998): "[H]ighly pervasive harassment should, in the exercise of reasonable care, be discovered by management-level employees." *See also, e.g., Bishop v. National R.R. Passenger Corp.*, 66 F. Supp. 2d 650, 668 (E.D. Pa. 1999) ("[T]here can be constructive notice where the harassment is so pervasive and open that a reasonable employer would had to be aware of it.").

There was testimony at trial that the acts of harassment were open and pervasive. *See* Plaintiff's Response to Defendant DaimlerChrysler Corporation's Motion for Judgment Notwithstanding Verdict. This testimony was not uncontroverted. *See* Reply in Support of Motion of Defendant DaimlerChrysler Corporation for a New Trial and/or Remittitur at 3-8. But on a motion for judgment notwithstanding the verdict, we must "review . . . the evidence and all legitimate inferences in the light most favorable to the nonmoving party." *Forge v. Smith*, 458 Mich. 198, 204 (1998) (quoting *Orzel v. Scott Drug Co.*, 449 Mich. 550, 557

Indeed, the U.S. Supreme Court has held that an employer's failure to take effective remedial action once it has notice of harassment can cause the employer to be responsible for past harassment--even when it lacked notice of this harassment when it occurred: By failing to take reasonable action, the employer "ratifies" the past misconduct. *See Faragher*, 524 U.S. at 789 ("[T]he combined knowledge and inaction [of the employer] may be seen as . . . the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's

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(1995) (internal quotation marks omitted)). And even Defendant admits that some of the cartoons were posted. *See* Motion of Defendant DaimlerChrysler Corporation for Judgment Notwithstanding the Verdict at 17; *See also Wilson v. Chrysler Corp.*, 172 F.3d 500, 509 (7th Cir. 1999)(arguing that constructive notice can be presumed from cartoons and the like placed on assembly plant floor).

Finally, We emphasize that the pervasive and open quality of the harassment affects both the issues of actual and constructive notice. If the harassment is open and pervasive, the fact-finder can conclude that the employer should have known of the harassment--that-is, the fact-finder can conclude that the employer had constructive notice. If the harassment is open and pervasive, the fact-finder can conclude that the employer had to know of the harassment--that is, the fact-finder can conclude that the employer had actual notice. *See* Maurice H. Merrill, *The Anatomy of Notice*, 3 Univ. Chi. L. Rev. 417, 418 & n.11 (1936) (collecting cases). Courts, however, often appear to conflate these two distinct inferences from open and pervasive acts. *See, e.g., Wilson v. Chrysler Corp.*, 172 F.3d 500, 509 (7th Cir. 1999) (placing under the category or constructive harassment notice that is "presumed where the work environment is permeated with pervasive harassment").

policy."); *see also Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995) ("[E]mployers['] . . . stand[ing] idly by once they learn that sexual harassment has occurred . . . . amounts to a ratification of the prior harassment.").

As this Court understands it, Defendant's argument here is that it responded to each and every complaint of harassment Plaintiff made. *See* Motion of Defendant DaimlerChrysler Corp. for Judgment Notwithstanding the Verdict app. A (providing a "time line" emphasizing the incidents that Plaintiff reported). It responded to each such act, promptly and reasonably. Thus, on page 2 of its brief for JNOV Defendant states that it made clear that such acts would not be tolerated" after Plaintiff had told it that in May 1993 an employee had left a lewd cartoon near Plaintiff's tool box. (emphasis added). It also stresses that it "investigated the incident." *See* Motion of Defendant DaimlerChrysler Corporation for Judgment Notwithstanding the Verdict at 2. Thus we see Defendant's act-by-act response to each incident of harassment. *See also id.* at 4 & n.4 (stating how a supervisor concluded that a vulgar cartoon brought to his attention was not related to an earlier cartoon because the "circumstances were a lot different" and "the people on the shift Were different"). The problem inherent in such an act-by-act approach is that it neglects the duty to combat harassment as a whole, to use what happened to foresee what may happen. *See, e.g., Scusa v. Nestle U.S.A. Co.*, 181F.3d 958, 967 (8th Cir. 1999) ("An employer is not liable if it takes prompt remedial action which is reasonably calculated to end the harassment once the employer knew or should have known about the harassment.").

As Defendant sees it, the acts of harassment that Plaintiff did not report have to be ignored here--if Plaintiff did not

report the act, how can Chrysler be blamed for not responding to it? But the fact that acts of harassment continued after Defendant took action testifies to the effectiveness--or lack thereof--of its response. And even Defendant admits that Plaintiff complained about some of the acts that were committed. This raises the question whether Defendant should not have been more concerned than it apparently was that its response to the prior acts was less than fully effective and that perhaps a new approach was needed. *See Fall v. Indiana Univ. Bd. of Trustees*, 12 F. Supp. 2d 870, 881-82 (N.D. Ind. 1998) (finding that university might be liable for harassment even when it promulgated anti-harassment policy and even when it reacted "immediately" to plaintiff's complaint--"we do not find any triable issue of fact as to the University's response to the Plaintiff's complaint'--because university failed to "avoid the harm in the first place" by acting properly on past incidents involving harasser). We believe that this was a question properly left to the fact-finder. *See Lissau v. Southern Food Serv., Inc.*, 159 F-3d 177, 183-84 (4th Cir. 1998) (Michael, J., concurring in part and concurring in the judgment) ("[T]he new *Faragher-Ellerth* defense depends on facts . . . . ("[T]he new *Faragher-Ellerth* affirmative defense . . . especially fact intensive.").[11]

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[11] This also shows why Defendant is wrong when under "other erroneous and prejudicial rulings," *see* Motion of Defendant DaimlerChrysler Corporation for a New Trial and/or Remittitur at 13-14, it complains that this Court improperly allowed Plaintiff to relate acts of harassment that she had never complained about. *See also* note 9 *supra*.

In a related vein, we note that Defendant's argument that we improperly allowed Plaintiff and her Witnesses to testify about what

non-management people had stated about Defendant's remedial actions, *see id.* at 13, also seems to spring from a misconception about just what its duty was here, and how the evidence can show whether or not it fulfilled its duty. Defendant argues that the statements were hearsay and thus inadmissible.

It seems that such statements were not offered for proof of the matter or matters they directly asserted. If Worker X testified that he felt Defendant's 'remedial actions' were ineffectual," the testimony would be used not as direct proof that the actions were ineffectual but as indirect proof that they were ineffectual: Yes, the testimony helps to show that the remedial actions were not effective, but not because we accept Worker X's opinion as to them but because the fact he has such an opinion shows that Defendant's message about harassment was not getting through to its workers. In other words, one way to assess the effectiveness of a company's anti-harassment program is to go to that company's workers and ask them how much faith they have in (or how much fear they have of) the program.

Some courts have classified statements of this type as non-hearsay, reasoning that they are offered not to show the truth of the matter asserted. *Cf., e.g., Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423 (7th Cir. 1986) (illustrating a supervisor's attitude toward blacks by his calling blacks "niggers" did not violate hearsay prohibition); *see also* FRE 801 (a) advisory committee note.

Wright and Miller's *Federal Practice and Procedure* makes a persuasive argument that such statements are hearsay, or at least involve many of the same dangers that lie behind the prohibition of hearsay. The argument is that what Worker X's statement is being used for is to show that he believed that his company's anti-harassment policies were ineffective; but if the statement had been "I believe that the anti-harassment policies are not effective," it

Even at this time Defendant seems to labor under the misconception that the scope of its response was limited to the particular nature of the act committed and the identity of the perpetuator. Thus, as quoted *supra*, Defendant notes that one vulgar cartoon was not like an earlier one and was not distributed by the same people. The implicit argument: an employer only has a duty to respond to the particular form of harassment at hand and the particular workers who committed it. But it is not prima facie unreasonable to conclude that where one form of harassment has been committed others may follow--indeed, this may well be likely, since cracking down on one form of harassment may, by a "substitution effect," encourage other forms that have not been forestalled. *Cf.* Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 94 Mich. L. Rev. 2477, 2489-96 (1997) (pointing out that cracking down on some forms of crime encourages criminals to "substitute other forms of crimes that have not been so heavily suppressed). Nor is it unreasonable to presume where some workers harass, others may follow.

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could not have been-admitted because it would have been used to show precisely what it was asserting, i.e., that Worker X believed the policies were not effective. The distinction between the two types of statements is artificial, and it makes no sense to treat the two differently for purposes of admissibility. *See* 31 Michael H. Graham, *Federal Practice and Procedure* sec. 6706 & n.23 (1997). However, the authors admit that such statements would still be admissible because they fall under the hearsay exception for existing state of mind. *See* 31 *id.* at 72; MRE 803(3).

Thus, the statements by non-supervisors about which Defendant complains were admissible.

Conclusion

To summarize, we pull together the elements of the previous argument on duty and notice to show how it defeats each of the arguments Defendant makes here" (1) that Plaintiff failed to assist in identifying the harassers; (2) that it responded reasonably to each act of harassment; and (3) that Plaintiff failed to report-many of the acts. For analytical convenience, we divide our analysis into actual notice and constructive notice.[12]

We begin by noting that there was testimony at trial--including by Plaintiff herself--that she endured frequent and open harassment. There may have been testimony disputing this, but, once again, on a motion for judgment

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[12] In organizing our discussion by the concept of notice, we follow the practice of the Note we have cited in the text. As the author of the note observes, notice provides a useful analytical tool for understanding harassment law. *See* Note, *Notice in Hostile Environment Discrimination Law*, 112 Harv. L. Rev. 1977, 1978-79 (1999). As the-Note also states, there is one important distinction to keep in mind in addressing harassment law via notice, *see id.* at 1979 n. 11: the burden of proof as to notice, or lack thereof, is on the defendant for a supervisor's harassment; on the plaintiff for a co-worker's harassment. *See id.; see also Wilson v. Tulsa Junior College*, 164 F.3d 534, 541 (10th Cir. 1998). Here the burden-of-proof issue is irrelevant because "[a] burden of proof has impact only when the evidence is in equipoise." *See Dubinsky v. United States*, 62 F.3d 182, 185 (7th Cir. 1995), *cert. denied*, 516 U.S. 1150 (1996).

Finally, we note that notice need not be shown when--as is not the case here--the harassment resulted in a tangible adverse employment action. *See Faragher*, 524 U.S. at 808.

notwithstanding the verdict, we must "examine the evidence presented at trial in the light most favorable to plaintiff." *Badalamenti v. William Beaumont Hosp.-Troy*, 237 Mich. App. 278, 283 (1999). Chrysler admits that Plaintiff complained to it in May and June of 1993 that she had been harassed.

This factual scenario leads us to two conclusions. One, it is undisputed that Chrysler had actual notice Plaintiff was being harassed by June 1993. Second, given the pervasiveness and openness of the harassment, the fact-finder could reasonably conclude that Chrysler had notice of more than just the acts Plaintiff actually complained of. *See Jackson v. Quanex Corp.*, 191 F.3d 647, 663 (6th Cir. 1999) ("[N]owhere do the . . . standards specify that the plaintiff, or any other individual, must 'report' the offensive conduct of co-workers to the employer."); Note, *supra*, at 1981-82 ("[W]hen an employer representative observes conduct such as groping, vulgar language about or toward an employee, or obscene graffiti, the employer is considered to have notice." (footnotes omitted)). Moreover, just as the open and pervasive quality of the harassment could have given Chrysler notice of the actual acts themselves, so, too, could it have given Chrysler notice of who was committing them. Thus, even assuming Plaintiff did not Cooperate fully in identifying the harassers, Chrysler could have had notice of them and a consequent duty to act against them.[13]

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[13] With respect to the issue of actual notice, we also note that evidence was presented at trial that Plaintiff, by way of deposition quite early on, gave Defendant's lawyers a complete account of what was happening, including many events that Chrysler claims it never had notice of. As agents of Chrysler, the facts of the harassment that Plaintiff gave the attorneys can be imputed to

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Chrysler. *See Distasio v. Elmer*, 157 F.3d 55, 64 (2d Cir. 1998) (knowledge-by employee who has duty to stop harassment or inform the company of harassment will be imputed to employer); *Young v. Bayer Corp.*, 123 F.3d 672, 674 (7th Cir. 1997) (knowledge by employee who has duty to refer complaint, either because he was specifically assigned such a duty or "general norms of management" give him such a duty, will be imputed to employer).

To justify-such imputation, the information must have been imparted to the attorneys within the scope of their authority concerning a matter within that scope. *See, e.g., Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 321 (7th Cir. 1992) (refusing to impute knowledge agent had of harassment to employer when agent was accounts supervisor who had no role with department that handled harassment complaints). *But cf. Young*, 123 F.3d at 674 (suggesting that "norms of management" may confer responsibility upon employee to report harassment even when he has not been assigned specific duty to do so). When the attorneys received the information, they were working for Chrysler and charged with the task of reducing Chrysler's potential for liability from the harassment. *See Veal v. Geraci*, 23 F.3d 722, 725 (2d Cir. 1994) (The relationship between an attorney and the client he or she represents in a lawsuit is one of agent and principal."). *See generally Restatement (Second) of Agency* sec. 1 cmt. e (1957). To do this they had to determine just what Plaintiff's allegations were; moreover, given the importance a prompt employer response plays in protecting the employer from liability for harassment, they were also entrusted with deciding whether anything Plaintiff said should be communicated to the company such that the company could respond appropriately. We thus conclude that what Plaintiff told the lawyers Was communicated to them within the scope of their authority for Chrysler, concerning a matter within that scope, and we thus conclude that the information may be imputed to Chrysler.

In arguing that it responded appropriately here, Chrysler emphasizes how it responded to the acts of which Plaintiff did complain. But, by the foregoing analysis, it may have had a duty to respond even to the acts of which Plaintiff omitted to notify it. We note that a defendant is liable for harassment that it knew of but did nothing in response to; that is, the employer with knowledge cannot simply sit on its hands. *See, e.g, Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d.426 (2d Cir. 1999) (finding, in case of racial harassment, that defendant's failure to take any response to some of the harassing acts and the fact the harassment continued after Plaintiff had complained meant that "reasonable jurors could disagree about whether [the defendant's] responses were so 'effectively remedial and prompt' as to shield [defendant] from liability as a matter of law); *Dees v. Johnson Controls World Servs., Inc.*, 168 F.3d 417, 422 (11th Cir. 1999) (employer held liable when it knew of harassment prior to actual complaint but did nothing, this despite the fact that it took immediate action once complaint was made); *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997), *cited in Faragher*, 524 U.S. at 799; *Booker v. Budget Rent-A-Car Sys.*, 17 F. Supp. 2d 735, 747-48 (M.D. Tenn. 1998) (rejecting employer's affirmative defense that as matter of law it took "reasonable care" to protect employee against racial harassment where evidence showed that employer knew of incidents it did nothing about). Surely, when even Chrysler formulates its defense around its response to the acts of which Plaintiff complains,-a reasonable fact-finder could conclude that it did nothing to protect Plaintiff from acts of which she never complained--but which, a reasonable fact-finder could conclude, it had actual notice of.

The argument from constructive notice is an argument from "should have," that is, an argument from negligence.

See, e.g., Wilson v. Chrysler Corp., 172 F.3d 500, 509 (7th Cir. 1999) ("We have . . . recognized that notice may be presumed where the work environment is permeated With pervasive harassment."); *Bishop v. National R.R. Passenger Corp.*, 66 F. Supp. 2d 650, 668 (E.D. Pa. 1999) ("[T]here can be constructive notice . . . where the harassment is so pervasive and open that a reasonable employer would had to be aware of it."); Note, *supra*, at 1979 ("[T]he question whether an employer had constructive notice of a hostile environment examines whether the employer took reasonable care to prevent and detect a hostile environment."). Thus, the fact-finder here could have concluded that Defendant should have been aware of the harassment--of all the harassment that is, not just the acts Plaintiff complained of.

In determining constructive notice, the actions--or lack thereof--of the employee do matter. However, the inquiry into the employee's actions is not so straightforward as Defendant would have it; the question is not simply whether the employee complained but also whether, if the employee did not complain, she acted reasonably in failing to do so. *See Faragher*, 524 U.S. at 807; *see also Greene v. Dalton*, 164 F.3d 671, 674-75 (D.C. Cir. 1999) (interpreting to mean that the employer cannot absolve itself simply by showing that the employee delayed reporting but must instead show that the victim acted unreasonably in so delaying). In the instant case, there was evidence from which to conclude that Plaintiff did not act unreasonably in not reporting each and every incident. In particular, when it became clear that after her first complaint in 1993, the harassment did not stop, Plaintiff may well have concluded that Defendant' s anti-harassment policy was toothless. *See Morgan v. Ford*, 6 F.3d 750 (11th Cir. 1993) (per curiam) (reversing grant of summary judgment on plaintiff's claim of constructive discharge arising from

harassment where plaintiff had complained about harasser via employer's internal complaint system yet harassment had not stopped), *cert. denied*, 512 U.S. 1221 (1994); *Blough v. Hawkins Mkt., Inc.*, 51 F. Supp. 2d 858, 865 (N.D. Ohio 1999) (stressing that harassment had stopped once employer had been informed of it). Admittedly, the law does not require success" a company can escape liability even when its policy fails to prevent future harassment. *See, e.g., Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1036 (7th Cir. 1998). But the law does require that the anti-harassment efforts be "reasonably likely," *see id.*, to prevent future harassment. In the instant case, where there was testimony that Plaintiff suffered frequent and severe harassment even after Defendant had made its response to a particular act, the fact-finder was entitled to conclude that Chrysler failed to meet the "reasonably likely" standard. *See Mikels v. City of Durham*, 183 F.3d 323, 331 (4th Cir. 1999) (stressing that a "critical" factor in assessing the reasonableness of the employer's response is whether the employer was on notice of prior acts of harassment and whether the responses to these prior acts had been "ineffectual": "[B]ased on this prior history, a jury Might reasonably find that the employer's response following [the victim's] complaint, like that following earlier complaints, was equally ineffectual.") ; *see also Spicer v. Virginia*, 66 F.3d 705, 710 (4th Cir. 1995) (en banc) (granting summary to defendant employer when facts conclusively showed that "offensive remarks" ceased after remedial action had been taken); *Wahlstrom v. Metro-North Commuter Co.*, No. 96 Civ. 3589 (PKL), 2000 WL 356382, at "12-'16 (S.D.N.Y. Apr. 6, 2000) (noting that "mere existence of sexual harassment complaint procedures does not immunize defendant" and finding employer's response adequate--when harassment had stopped afterward (quoting *Crisonino v. New York City Hous. Auth.*, 985 F. Supp. 385,

390 (S.D.N.Y. 1997) (internal quotation marks omitted))).[14] Moreover, the reasonableness of the response is judged partly in terms of the severity of the harassment--and here the harassment was severe. *See Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir. 1995) ("[W]hat is reasonable depends on the gravity of the harassment."). Much more than what discrimination law labels a "stray remark" was at issue. *Cf. Shaw v. AutoZone, Inc.*, 180 F.3d 806, 813 n.3 (7th Cir. 1999) (finding that employer knowledge that one employee had described victim as part of his "harem" was not enough to put employer on notice that harassment was occurring), *cert. denied*, 120 S. Ct. 790 (2000). Under the constructive-notice rubric, then, a fact-finder could find Defendant liable.[15]

For both actual and constructive notice, thus, we reject Defendant's argument that the fact Plaintiff did not report

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[14] The *Mikels* court, then, would agree that the duty to protect the victim of harassment involves both hindsight and foresight, involves assessing what has happened in the past, what corrective measures have or have not worked in the past, and what is likely to happen in the future. As we stated, *see* text *supra*, Chrylser, in contrast, would formulate its duty in terms of a specific response to a specific event.

[15] Moreover, given that Plaintiff did report some of the incidents, yet the harassment continued unabated, one could infer any failure by Plaintiff to report more incidents made no difference here--was not a "but for" cause of the continued harassment she suffered. In *Faragher*, Justice Souter stated that "[i]f the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so." *Faragher*, 524 U.S. at 806-07 (emphasis added). The reasonable fact-finder could have concluded that any failure to report by Plaintiff made no difference.

each and every act, the "fact" it responded reasonably to each complaint Plaintiff did make, and the "fact" Plaintiff did not always cooperate in naming the harassers means that no reasonable jury could have found in Plaintiff's favor under the prevailing standards of harassment law.

The Severity and Pervasiveness of the Harassment

Defendant also argues here that what Plaintiff was Subjected to was not severe or pervasive enough to constitute a hostile environment. *See Grow v. W.A. Thomas Co.*, 236 Mich. App. 696, 705 (1999) ("To sustain a claim of hostile environment sexual harassment, the harassment must be sufficiently severe or pervasive to alter the conditions of-the victim's employment and create an abusive working environment. " (quoting trial court' s jury instructions (internal quotation marks omitted))).

We disagree. There was ample evidence here from which to conclude that the harassment Plaintiff was subjected to was severe and pervasive such that the conditions of her working environment were altered. Testimony showed frequent instances of abuse ranging from urination on her work area to constant name-calling to instances in which Plaintiff's safety was arguably endangered by her male co-workers' refusal to cooperate with her.[16] We believe that a reasonable fact-finder

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[16] While some of the events, viewed in isolation, may be trivial, the number of events here--the frequency of the harassment--and the variety call to mind what the Seventh Circuit said in *Wilson v. Chrysler Corp.*, 172 F.3d 500 (7th Cir. 1999):

> The multifaceted nature of the harassment, its frequent and at times routine character, and the participation of so many

could have found the "totality" of these incidents altered the conditions of her employment, *Radtke v. Everett*, 442 Mich. 368, 394 (1993). *See also Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (in determining severity of harassing conduct relevant factors include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee' s work performance").[17]

> members of the workforce, suggest that [the plaintiff's] work environment was objectively hostile or abusive. In short, [the plaintiff] depicts a workplace in which harassment rises almost to the level of an institutional norm. Her work environment was surely one paradigmatic scenario the Supreme Court had in mind when it coined the phrase "hostile work environment."

Id. at 510.

[17] In a footnote, *see* Motion of Defendant DaimlerChrysler Corp. for Judgment Notwithstanding the Verdict at 11 n.9, Chrysler also argues that Plaintiff cannot recover here because she cannot show that any of the alleged incidents were committed "on the basis of sex," *Radtke*, 442 Mich. at 382. In *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998), Justice Scalia noted that harassing behavior need not be motivated by sexual desire to support an inference of discrimination on the basis of sex"; he then proffered the example of a female victim whose harasser is also female, with the harassment taking the form of sex-specific and derogatory terms." *Id.* at 80. Much of the harassment in the instant case was "sex-specific" and consisted of "derogatory terms." As for the harassment that was not sex-specific and/or derogatory, in light of the harassment that was of this form a reasonable fact-finder could conclude that all the acts of harassment were "on the basis of sex." We thus disagree with Defendant's contention that only "mere

THE SIZE OF THE AWARD, AND OTHER ISSUES CONCERNING DAMAGES

Defendant argues that the award here was plainly in excess of what a reasonable jury would have awarded. To buttress its argument, Defendant produces verdicts from other harassment cases.

However, what Defendant ignores is that there is something present in the instant case that is not present in

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speculation and conjecture" were produced to show that Plaintiff was harassed because of her sex.

We briefly note another obstacle Defendant sees to Plaintiff's recovering here: that Plaintiff should not be able to recover for acts in which she herself engaged. It is Chrysler's contention that Plaintiff used off-color jokes, pranks, and foul language, *see* Motion of Defendant DaimlerChrysler Corp. for Judgment Notwithstanding the Verdict at 11. However, even assuming Defendant's contention to be correct, our previous discussion shows that the law makes a distinction between acts committed "on the basis of sex" and the same acts not committed on the basis of sex. Furthermore, even going by Defendant's list, we must conclude that many of the acts of harassment Plaintiff complained of were in fact not engaged in by Plaintiff herself; for instance, there is no allegation that Plaintiff urinated on the workplace of another. The rationale that appears to underlie Defendant's argument here--that a workplace like an auto plant is naturally a rough-and-tumble milieu--comes dangerously close to implying that protected groups like women and minorities have no right to a workplace free of discrimination. *See Smith v. Sheahan*, 189 F.3d 529, 534-35 (7th Cir. 1999) (criticizing the view that "prevailing culture can excuse discriminatory actions" and noting that there is no "assumption-of-risk defense to charges of workplace discrimination").

most harassment cases" namely, that the harassment, by worsening Plaintiff's substance-abuse problem and her general medical condition, may be responsible for significantly shortening her life. *Cf. Neal v. Honeywell, Inc.*, 191 F.3d 827, 832 (7th Cir. 1999) (noting that "threats of physical injury" can justify high recovery for emotional injury despite "slew of discrimination cases that have ended with smaller recoveries for emotional distress"). Indeed, Defendant admits the importance of this factor, if only implicitly, by devoting much of its efforts here to discrediting the testimony of Mr. Hnat, in particular, his testimony linking the harassment to the worsening of Plaintiff's health and the shortening of her life span.[18] Given this aspect of the case, we cannot conclude

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[18] Of course, the severity of the harassment experienced is relevant to the damages award in the sense that the worse the harassment, the more likely we are to believe that the victim was damaged by it.

But, assuming the victim can provide evidence that she suffered the damages she claims, the basic rule for awarding damages remains the "thin skull" or "eggshell" plaintiff rule: that a defendant must take a plaintiff as he finds her, and"that, if the defendant's wrongful conduct is proved by a preponderance of the evidence to be a proximate cause of the aggravation of a latent disability, he is liable for such aggravation." *McNabb v. Green Real Estate Co.*, 62 Mich. App. 500, 518-19 (1975); *see also Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1294-95 (8th Cir. 1997) (applying this principle under Minnesota law in the context of sexual harassment), *cert. denied*, 524 U.S. 953 (1998).

Thus once Plaintiff has shown that the harassment was severe and pervasive, *see* text *supra*, Defendant cannot escape liability for Plaintiff's damages here merely by showing that the harassment she was subjected to was less severe than that suffered in other cases.

that the size of the award "shocks the judicial conscience, appears unsupported by the proofs, or seems to be the product of improper methods, passion, caprice, or prejudice," *Blake v. Consolidated Rail Corp.*, 176 Mich. App. 506, 523 (1989), *app. dismissed*, (Mich. Feb. 1, 1990).

With respect to the damages themselves, Defendant also argues that the award is inherently self-contradictory because Plaintiff's counsel asked the jury to award Plaintiff damages based both on the "fact" Plaintiff's death was imminent and on the "fact" that Plaintiff would live many more years. Plaintiff sees this contradiction revealed in such things as Plaintiff's counsel's demand that she be given $312,000 for future clinical treatment despite his representation that her death was imminent.

Attorneys are given great freedom to argue alternative theories. In the instant case, Plaintiff's lawyer had to cover all the bases, so to speak: he had to allow for the fact that the jury might not agree with him that Plaintiff would die soon and that the jury would thus calculate damages based on Plaintiff's living a normal life span. What is important is whether the jury appreciated the difference and realized that it could not produce an award based on mutually contradictory premises. In fact, Defendant does nothing to show that the jury was so misled, and points to nothing in the verdict form to show that a double recovery was effected. Plaintiff's lawyer explicitly referred to "another set of damages" when speaking of future expenses for medical care and the like, thus distinguishing the two sets. *See* Exh. K at 100, Defendant's Trial Transcript Excerpts. Admittedly, these words are not dispositive–he did not say that the jury had to award only one set. But it would seem to be Defendant's obligation here to show where Plaintiff's counsel encouraged

the jury to commingle the damages in each set or to award both sets. "Another set of damages" may not equate to an admonition that only one set could be awarded, but, by the same token, it does not equate to permission to award both sets. Defendant, *see* Motion of Defendant DaimlerChrysler Corporation for a New Trial and/or Remittitur at 16-17, seems to think that the mere fact Plaintiff's lawyer discussed both sets equates to such permission. But Plaintiff's lawyer, again, had to allow for the possibility that the jury would calculate damages on the assumption Plaintiff's death was not imminent. We note that any verdict deserves a presumption of rationality that disappears only if no "logical explanation" can support the jury's findings. *See McPeak v. McPeak*, 233 Mich. App. 483, 492 (1999), *iv. app. denied*, (Mich. Nov. 30, 1999). Here the logical explanation is that the jury believed that Plaintiff faced imminent death, and believed that Plaintiff believes that she faces death, and awarded her the entire amount of damages to compensate her for the resulting losses. *See Restatement (Second) of Torts* sec. 905(e) & illus. 6 (discussing recovery of damages for anxiety in general, including fear of death); *see also Stites v. Sunstrand Heat Transfer, Inc.*, 660 F. Supp. 1516, 1526-27 (W.D. Mich. 1987) (recognizing under Michigan law claim for fear of future injury and noting that slight "definite and objective physical injury" will suffice to support such a claim). As long as she effected no double recovery, Plaintiff was allowed to recover both for the impact of knowing now that she may soon die and for the death itself. *See id.*

Defendant's last argument under the damages category centers on whether there was enough evidence to conclude that the harassment Plaintiff suffered caused the damages claimed, given that even before she began at Chrysler Plaintiff had had emotional difficulties and a drinking

problem. We believe that this argument is but a restatement of Plaintiff's argument that Mr. Hnat' s testimony was inadmissible. That is to say, if one accepts the premise that Mr. Hnat's testimony regarding the state of Plaintiff's physical and emotional health was admissible, as this Court does, *see* text *supra*, then, we believe, there was sufficient evidence to conclude that the harassment was a substantial contributing factor to the damages Plaintiff claimed. *Cf. Arbelius v. Poletti*, 188 Mich. App. 14, 20 (1991) ("Any doubts about the relations between the causes and the effects should be resolved by the jury. (quoting *Fiser v City of Ann Arbor*, 417 Mich. 461, 475 (1983) (internal quotation marks omitted))).[19]

For the reasons stated above, we deny Defendant's motion for an evidentiary hearing/new trial/relief from judgment, Defendant's motion for judgment notwithstanding the verdict, and Defendant's motion for a new trial and/or remittitur.

IT IS SO ORDERED.

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[19] We do not mean to imply that Mr. Hnat's testimony was the only evidence linking the harassment to Plaintiff's health, and speaking to the issue of whether the harassment had in fact aggravated Plaintiff's condition. For one thing, the jury had the opportunity to observe Plaintiff and to listen to her own recounting of how the harassment had affected her. *See Meyers v. Wal-Mart Stores, E., Inc.*, 77 F. Supp. 2d 826 (E.D. Mich. 1999) (using Michigan law to conclude that aggravation of a preexisting condition can be shown in part by a plaintiff's own testimony, including when the expert testimony by itself is insufficient to establish aggravation). "[U]nder Michigan law, plaintiff is competent to provide his own lay testimony as to his condition before and after injury." *Id.* at 836.

/s/ _____
JOHN A. MURPHY
CIRCUIT COURT JUDGE

APPENDIX H

STATE OF MICHIGAN
IN THE SUPREME COURT

Supreme Court Docket No: 122457
Court of Appeals Docket No: 227392
Lower Court No: 94-409216-NH

[Dated April 14, 2003]

LINDA M. GILBERT,
Plaintiff-Appellee,

vs.

DAIMLER CHRYSLER CORPORATION,
Defendant-Appellant.

FIEGER, FIEGER, SCHWARTZ & KENNEY, P.C.
By: GEOFFREY N. FIEGER (P30441)
TAMMY I. REISS (P41851)
MARK C. SMILEY (P38910)
Attorneys for Plaintiff
19390 West Ten Mile Road
Southfield, Michigan 48075
(248) 355-5555

KINEBAUM OPPERWALL HARDY & PELTON, P.L.C.
By: THOMAS G. KIENBAUM (P15945)
ELIZABETH HARDY (P37426)
NOEL D. MASSIE (P28988)
Attorneys for Defendant
325 South Old Woodward Avenue
Birmingham, Michigan 48009
(248) 645-000

BENDURE & THOMAS
By: MARK R. BENDURE (P23490)
Attorneys of Counsel for Plaintiff
645 Griswold, Suite 4100
Detroit, Michigan 48226
(313) 961-1525

OFFICES OF PATRICIA J. BOYLE
By: PATRICIA J. BOYLE (P11084)
Of Counsel for Defendant
325 South Old Woodward Avenue
Birmingham, Michigan 48009
(248) 645-0000

AFFIDAVIT OF GEOFFREY N. FIEGER IN SUPPORT OF MOTION FOR RECUSAL AND FOR EVIDENTIARY HEARING

STATE OF MICHIGAN)
)ss.
COUNTY OF OAKLAND)

GEOFFREY NELS FIEGER, being first duly sworn, deposes and says that:

1. Except as otherwise stated in this Affidavit, the contents are made on personal knowledge of which I can and will testify if called as a witness.

2. As to matters of which I do not have personal knowledge, I believe that the contents are true, based on information available to me, and can be proven at an evidentiary hearing.

3. I was trial counsel for Linda Gilbert, Plaintiff in the above-entitled case.

4. I have reviewed the Statement of Facts of the Brief filed in support of the Motion for Recusal and for Evidentiary Hearing and, to the best of my information, knowledge and belief, all factual statements therein are true.

5. A verdict and Judgment have been obtained in favor of my client, Linda Gilbert, against Defendant Daimler Chrysler.

6. On appeal, the Court of Appeals affirmed the verdict and Judgment for Linda Gilbert [#227392, unpublished *per curiam* Opinion released 7/30/02; Hon. William C. Whitbeck, Hon. Jane Markey; Hon. Thomas Fitzgerald], and denied Defendant's Motion for Rehearing [Order of 9/12/02].

7. My law firm, and through it I personally, have an economic interest in the outcome of the pending Application pursuant to a contingent fee agreement and the attorney fee recovery allowed in an action under the Elliott-Larsen Civil Rights Act by MCLA 37.2802.

8. Neither the Michigan Chamber of Commerce nor the United States Chamber of Commerce participated or sought to participate in this case in the trial court or Court of Appeals.

9. Both the Michigan Chamber of Commerce and United States Chamber of Commerce have filed proposed *Amicus Curiae* Briefs in this Court in support of Defendant Daimler Chrysler, which has been identified as a member of each.

10. According to published reports, the Michigan Chamber of Commerce donated over $3,000,000, advertising or other things of value worth that amount, to the 2000 election campaigns of Justices Markman, Taylor and Young.

11. Additionally, Mr. LaBrant, the author of the proposed *Amicus* Brief of Michigan Chamber of Commerce, is credited with creation of a widely published advertisement, known as the "**my dancing tree**" ad which contributed to the election of Justices Markman, Taylor and Young in 2000.

12. Moreover, at about the time it filed its proposed *Amicus* Brief, in the fall of 2002, the Michigan Chamber of Commerce financed a massive public television ad campaign endorsing Justices Weaver and Young.

13. By this course of conduct, the Michigan Chamber of Commerce, which had no participation in this case in the lower courts, has asked this Court to benefit its member, Defendant Daimler Chrysler, after having publicly financed multi-million campaign donations to or for a majority of the members of this Court (Justices Markman, Young, Taylor and Weaver).

14. By Order of April 8, 2003, with no indication of recusal or dissent from Justices Corrigan, Markman, Weaver, Young, or Taylor, the Court did what the Michigan Chamber requested: permit it to participate as *Amicus Curiae* and grant leave to appeal to its member, Defendant Daimler Chrysler.

15. I sincerely believe that it would minimally create an appearance of impropriety for Justices Markman, Taylor, Young and Weaver to participate in deciding this appeal on its substantive merits after publicly receiving a multi-million dollar benefit from Defendant Daimler Chrysler's *Amicus* supporters, which are groups to which it belongs.

16. I also sincerely believe that public campaign contributions of this magnitude necessarily give rise to a bias, prejudice, or predisposition on the part of Justices Markman, Young, Weaver and Taylor to benefit Defendant, whose organization contributed to the campaigns by which these Justices attained or retained their seats on this Court.

17. I was the nominee of the Democratic Party for the office of Governor of the State of Michigan in the 1998 election.

18. My principal opponent in that election was Governor John Engler.

19. During that campaign, and on other occasions, Governor Engler and I have been very critical of each other publicly.

20. In 1993, on a statewide broadcast radio station, Governor Engler advocated my disbarment, as a means of

preventing conduct of my client, Dr. Kevorkian, that Governor Engler found objectionable.

21. During the campaign, and during the term of office of Governor Engler, the wife of Justice Taylor has been on the staff of Governor Engler as legal counsel to the Governor.

22. I have been told that Governor Engler lived with Justice Taylor and his wife at a time when he was separated or divorced from his first wife, Colleen Engler.

23. Justices Taylor, Corrigan, Young and Markman have been appointed to the Court of Appeals and/or Supreme Court by Governor Engler and, to that extent, owe their judicial offices to my critic and former adversary, Governor Engler.

24. In an apparent effort to kindle or rekindle among these Justices antipathy, bias, or prejudice to me, Defendant Daimler Chrysler has presented to this Court, as Exhibits to its Application, materials regarding the 1998 gubernatorial campaign.

25. I believe that these filings by Defendant Daimler Chrysler were intended to, and may in fact, kindle or rekindle bias, prejudice or antipathy, toward me by Justices Corrigan, Taylor, Young and Markman.

26. This concern is enhanced by the public statements about me by Justice Young, who is reported as believing that I "hate this court", and that he personally believes that there is, "honor in that" hate ["Geoffrey Fieger and his trial lawyer cohorts hate this Court. There's honor in that"].

27. My concerns are further enhanced by the public statements of Justice Markman, who regards those who represent plaintiffs in medical malpractice cases, like myself, as his opponent ("Our opponents, the people who quite frankly make a livelihood suing [doctors]...").

28. Additionally, Justice Taylor has publicly made statements regarding my economic interest in certain cases, including this case particularly ("Geoffrey Fieger .... has $90 million of lawsuit awards pending in the State Court of Appeals").

29. Justice Corrigan has even initiated a Request for Investigation, which has since been dismissed, by which she threatened the loss of my license to practice law, the event advocated by Governor Engler in 1993. Further, Justice Corrigan's husband, now deceased, wrote numerous articles published in newspapers critical of me and my representation of Dr. Kevorkian. She has previously disqualified herself from a case involving Dr. Kevorkian after this issue was raised.

30. In view of these circumstances and others detailed hereafter, I sincerely believe that Justices Corrigan, Markman, young and Taylor harbor a predisposition of bias or prejudice against me personally.

31. I further believe that it would minimally create the appearance of impropriety for these Justices to participate in this appeal after having attacked me personally.

32. My concerns and beliefs are enhanced because of the public nature of these criticisms and announced predispositions, and by the fact that these statements (other

than the Request for Investigation by Justice Corrigan) were made in the context of a political campaign by which the statements were ostensibly made to curry electoral favor by suggesting a predisposition to rule adverse to me and my clients.

33. I am aware of other examples of public political advertisements on behalf of Justices Markman, Taylor and Young targeting me personally, in their successful 2000 campaign for the offices they now occupy.

34. These statements were made even though I was not a candidate for public office during that election, and have never been a candidate for public office since 1998.

35. In one advertisement, featuring what I believe to be the voices of Justices Markman, Taylor and Young, the ads for the candidates nominated by the Democratic Party were characterized as "vicious", "false", "silly" a "smear campaign" and "degrading the Court and the public's confidence in Michigan's judiciary". The advertisement then continues, "Some people will do anything to get elected. No wonder Geoffrey Fieger, Jesse Jackson [and others who support the Democratic candidates] ...".

36. The implication of that ad seems to be that I supported the adversaries of these Justices because of my fondness for vicious, false and degrading statements, an implication which I regard as an expression of bias or prejudice toward me by Justices Markman, Taylor and Young.

37. An another example, the 'Victory Line" publication, which promoted the candidacy of Justices Young, Taylor and

Markman, attacked me by name and accused me of using "specious legal reasons" to foster "The virtual explosion of litigation--most of which is frivolous, excessive and very expensive for taxpayers."

38. I am deeply concerned with the announcement that most litigation is frivolous, an announcement which suggests a predisposition to reverse a recovery for a plaintiff like Ms. Gilbert.

39. Another political advertisement on behalf of Justices Markman, Young and Taylor entitled, "He's back..." features my picture, and contends that "...Geoffrey Fieger [is] trying to take over Michigan's Supreme Court. Their strategy: elect liberal judges who are soft on crime", and characterizes the opposing Candidates as "FIEGER's FRIENDS" and "the Fieger team".

40. Yet another piece of campaign literature issued on behalf of Justices Taylor, Markman and Young, entitled "Our police make critical judgements [sic] each day", criticized the opposing candidates as "Geoffrey Fieger's friends".

41. Another piece of campaign literature, which characterized Judge Fitzgerald as a "Geoffrey Fieger libera[l]", was entitled "Forever isn't long enough for a child molester", implying that I support sexual abuse of children.

42. A press release on March 3, 2000 criticizing candidate Marietta Robinson, issued by the Michigan Republicans, who nominated Justices Young, Markman and Taylor, criticized her as favored by "a multi-millionaire trial lawyer like Geoff Fieger" who, if elected, would allow "trial

lawyers like Geoff Fieger [to] keep getting richer while Michigan families keep footing the bill".

43. These public statements on behalf of Justices Markman, Young and Taylor bespeak a bias or prejudice against me, a pre-occupation with my income and an implied predisposition to reverse cases in which I have achieved a significant recovery for a client.

44. I sincerely believe that for the reasons discussed above, Justices Corrigan, Taylor, Young and Markman are prejudiced or biased against me, and are predisposed to reverse any significant verdict returned in favor of any of my clients.

45. This predisposition has also been discerned by public commentators such as former President of the State Bar of Michigan Eugene Mossner and in the popular media.

46. I sincerely believe that it would create an appearance of impropriety for Justices Markman, Corrigan, Young and Taylor to participate in deciding this appeal on its substantive merits.

47. I believe that, if an evidentiary hearing were held, all of the above assertions of fact could be proven, and that yet other instances of comments or conduct adverse to me or my clients would be unearthed.

/s/ _____
GEOFFREY NELS FIEGER

Subscribed and sworn to before me this
14th day of April, 2003

/s/ _____

Stephanie Stipanovich
Notary Public
Oakland County, Michigan
My Commission Expires: 4/21/06

APPENDIX I

EXHIBIT B

VIDETAPE TRANSCRIPTION OF EXHIBIT A

VOICE: -- WWJ News Radio 95 in Detroit. This is Ask The Governor. Michigan Governor John Engler is standing by to take your telephone calls, answer questions, discuss problems, issues and successes facing our great State.

Here's how you can be a part of this evening's program: If you're in the Metropolitan Detroit area, call 559-9595. If you're calling from anywhere else in Michigan, call the following number collect, area code (313) 559-9595. Now, here's the moderator of Ask The Governor, Joe Donovan.

JOE DONOVAN: Good evening and welcome to our February 1993 program. Governor John Engler is here in our studio in Detroit and we are awaiting your telephone calls from the people, Governor, who pay your salary. And this evening, via CBS Radio, we also have a nationwide hookup, so there's stations in many different parts of the country who are going to be listening to part or all of our discussion tonight, Governor.

And you know why there's this national interest. As of a little while ago you made it a felony for Dr. Jack Kevorkian, or anybody else, to assist in a suicide. So why are you smiling?

GOVERNOR ENGLER: Well, I'm not smiling at that news, I was surprised at the nationwide hookup. This show that we do has been a very popular one in Michigan, but to go outside the state –

The legislation actually came as a little bit of a surprise late yesterday. It didn't look like anything would happen in the Legislature and it would be 35 days before the law took effect, but the House of Representatives was able to work out a compromise on Senator Fred Dillingham's legislation and clarified the status of the Hospice movement in Michigan, because we want to make sure that nothing interferes with the operation of the Hospice and the marvelous care they give.

But now we'll have a commission, they're going to take about two years to look at all of the issues surrounding death and dying, and in the meantime, hopefully Dr. -- Former Dr. Kevorkian, who has been suspended by Michigan, suspended by California, is out of business.

JOE DONOVAN: Why do you think that the state Legislature did this turnaround, because all of the people who seem to know what they're talking about up there in Lansing figured that there would be just too much objection? Was it simply the Hospice thing? Do you think the last barrage, if you will, of assisted suicides took some people off the fence on this issue?

GOVERNOR ENGLER: I think it did. I think they were repulsed by what they saw what almost appeared to be nightly on the newscasts, but six this month. And I think that the sense is that what I said today when I signed the legislation is that these are profoundly difficult questions for a society to deal with.

We know that in the health care debate in Washington one of the things that they're struggling with is the disproportionate amount of health care that's consumed in the last days and weeks of life, and so what we have is a debate where there aren't any easy answers. And there are people of course who hold firmly the belief well, there's no role at all for government, but by the same token, we do set a lot of policies in other areas. We set a lot of policies surrounding death and dying, and we felt in Michigan that the Legislature is elected by the people to make these decisions and that nobody, including Jack Kevorkian, can simply appoint themselves to suddenly sit as judge and jury of who should live and who should die.

JOE DONOVAN: Before we get busy on the phone, if you would, would you share where your personal feelings are, someone is terminally ill and in terrible pain and, if you will, living without any dignity and indeed there would seem to be a strong argument for something to end this, how do you feel at that point? What do you say at that point?

GOVERNOR ENGLER: Well, I think each of those cases involves some profoundly difficult questions, and what are the facts, what's the psychological situation. I'm not a doctor, you know, I'm not in a situation where I think we can draw some generalizations. And I guess the point is that as a society, what do We want to say, and I think that clearly the medical doctors of the state of Michigan, speaking through their representatives, have opposed the way Mr. Kevorkian has proceeded. He simply set himself up as the person who had the answers to those kind of questions.

JOE DONOVAN: So short form, it sounds like you're not saying it's an absolutely wrong decision to terminate, if you will, a life somewhat prematurely in those situations, but –

GOVERNOR ENGLER: But should the State sanction it, should the State sit quietly back and say we have no opinion? What kind of help can be provided, I mean, take the Hospice --

JOE DONOVAN: Would you license someone to become let's say a medicaid provider, is that within the State's power; you license doctors to save lives, would you license someone to be a medicine?

GOVERNOR ENGLER: Well, it certainly seems to be quite at odds with the Hippocratic oath that all doctors adhere to. I find that to be a bit of a reach.

I read recently where I think it was the Netherlands that had acted to set up a new set of laws in their country, and this two-year study that's now going to take place, I'm sure is going to look at that. It's going to talk to some of the top ethicists in the world and talk to people from organizations like the Hemlock Organization, that have one distinct viewpoint, to some of the other medical organizations, some of the religious organizations, who take quite a different point of view.

It ought to be quite an interesting process that they're going to go through and I'm not going to prejudge it, I'm not going to give them a set of recommendations, I'm not going to tell them what they ought to write in their report.

JOE DONOVAN: Well, let's go to the telephones because we do have a stack of people who want to ask about things.

Michael from Livonia, you are with Governor John Engler, he is listening, so please Ask The Governor. What's your question tonight? Yes, Michael from Livonia, are you with us?

Q. Hi, how you doing?

A. Good, Michael, I can hear you.

Q. Just wanted to say what a great job I thought you were doing in the state and ask you -- sorry to switch gears, but to ask you, as we all got our property tax assessments for the year, what we ban do. to help you in changing the current legislation on property taxes?

A. I think all we need to do is get on the phone to talk to your state representative, state senator, tell him about your assessment, tell him your feelings about cutting property taxes.

I'm committed to supporting education, but it is important also to put in perspective -- we're spending about 9.2 billion dollars in public education today in the state and we're trying to strike a balance between the needs of education and the needs of property taxpayers to be able to keep their homes, to be able to pay their taxes, to remain in their current home. And I think that the approach that I've taken in Lansing of trying to increase state support for education, at the same time trying to get property taxpayers a break, is a balanced one and we're going to stay at that.

I think the other point to make here is that, you know, we're looking at more than half the people in Michigan getting double-digit assessment hikes this year and I just think when you look at a state like Michigan, we're trying to become much more competitive, those taxes aren't helping.

JOE DONOVAN: Let's switch gears now, we're moving on to Port Huron, and, Governor, a little later on, we'll discuss some of the big news that Mr. Frank O'Connell or I should say Mr. Mark Smith is going to be very interested in when your announcement comes up from Port Huron.

Mr. Smith, what is your question now, for Governor John Engler this evening?

Q. Good evening, governor.

A. Hi, Mark.

Q. I had the pleasure of meeting you a year ago at the Michigan Townships Association Convention.

A. Okay, down in Detroit, right, Downtown.

Q. I -- it's been a year, I. finally washed my hands I'd like to say also you're doing a great job. My question deals with the purity of elections. On a township level, there was several irregularities, and I called the attorney general's office, Secretary of State and Bureau of Elections.

I followed their directions precisely and more or less I feel as if I got sort of a brushoff, they passed the buck, and ultimately said well, you know, you can take it to court yourself if you think there was a problem.

Whose responsibility is it to assure the purity of elections, which of course is a£ the very foundation of our form of government?

A. Well, I certainly think that responsibility rests with the Bureau of Elections and the Department of Secretary of State. You know, the Board of Canvassers, if this is a local election at the county level, has some role to play, but beyond that, I would think that the Secretary of State -- I mean, he is the top election official in the State.

Now, it's also something that legislators will look in from time to time. We've had in the case of some legislative elections -- this goes back a few years, but we've actually had hearings and we have committees in the Legislature that work on election law, so I don't know what the nature of the problem is, but I would say over your way, Senator Dan DeGrow would be a good one to talk to, getting him in touch with your staff or your -- I mean, getting your problems in touch with his staff, getting him to work on it, and I'm going to be up in Port Huron tomorrow, so you can talk to me about it.

JOE DONOVAN: We are live from Detroit. This is Ask The Governor, February's edition, we'll be back with more calls to Governor John Engler in just a moment. It's nine minutes after the hour.

VOICE: You are listening to Ask The Governor via satellite from Lansing on the Michigan Entertainment Network, a division of the Great Lakes Media Group.

(COMMERCIALS/ADVERTISEMENTS)

JOE DONOVAN: We are back live with Governor John Engler, this is Ask The Governor and I'm Joe Donovan your moderator. And, Governor, let's go over to Highland Township, obviously, Governor, the property assessments have gone out and people have figured out what their bills are going to be.

Mr. John Fitzgerald of Highland Township, thanks for waiting, Governor John Engler is listening to your question.

Q. Hello, governor.

A. Good evening, John.

Q. I received my assessment, it went up 15 percent. My question to you is are you familiar with the Nye-Oxender bipartisan proposal on property tax reform?

A. Yes, I am.

Q. What is your opinion of that?

A. Well, let me tell you what that proposal also does, it takes the property tax right away from local property taxpayers, and there was a -- this actually was in the last session of the Legislature in one version, now it's back in a different version, I'm not sure what they're calling it. But one that I saw had as its structure the State would impose a property tax, be about 16 mills across the board and then that would be -- future increases would be determined by the Legislature, then there would be an income tax. And then for a number of schools even the state income tax and the state property tax wouldn't be enough, you'd still have to have a local income tax option.

I think that the proposal is a devastating proposal for job growth in this state, and I think one of the things we have to keep our eye on in Michigan is the fact that we still don't have enough jobs. For 15 years we haven't even been at the national average. We finally caught it, touched it one month, and hopefully that's something that we're going to be able to continue in the future. But that plan, raising income taxes, giving the Legislature control of raising property taxes, I'm not sure is permanent property tax relief.

JOE DONOVAN: Governor, along the same track, we don't have all the details, but it sounds like Wayne County executive, McNamara, is looking at getting permission for an experiment cutting or wiping out property taxes in return for a Wayne-County only sales or income or both tax, as just a way to see if this kind of thing would work. Do you think that's an experiment worth trying on a local level to see if it's got any good merit to it?

GOVERNOR ENGLER: Well, I'm always open to looking at different approaches. I do think that the real problem though with the property tax is the fact that it's funding schools, and about 75 to 80 percent of most people's property taxes goes to schools for education purposes. And so what County Executive McNamara is trying to solve is not exactly the problem that bothers most people, there is some greater relationship, I would assume, between the property tax and the services of my township or my county or my city government than there is a direct relation between property taxes and the quality of schools.

JOE DONOVAN: Mr- Sami Bahart (phonetic) of Detroit, Bahart of Detroit, thanks for calling, Governor John Engler

is with you live, he's listening, so please Ask The Governor, sir.

Q. Hello, Governor.

A. Good evening.

Q. Good evening, how you doing today?

A. I'm fine.

Q. My question is about Dr. Kevorkian, his lawyer is saying that the ban's not going to stop him from killing some more people. What's going to happen if he did it one more time?

A. We probably could stop him if his lawyer were disbarred, but the reality is that he would have to be arrested, prosecuted, and under the terms of the legislation it is made a felony crime, you know, there's a potential for a substantial fines, there's certainly substantial risks of some type of restriction of Mr. Kevorkian, so we'll see.

I'm hoping he won't do it, and rather than focus on what the penalties are, I don't think anyone -- you kind of see Mr. Kevorkian and he looks a sad person, I think, when you see him on television, and I think hopefully he'll say let's give this process a chance, let's see if the legislators, the house and the senate that wrote this bill can't come up with an approach that deals with all of the related issues and we don't have to go through this again.

JOE DONOVAN: You're a pretty smart lawyer, how long do you think it's going to take to resolve the expected court test of the law that you signed a couple of hours ago?

GOVERNOR ENGLER: Well, I don't think there's much of a court test at this point, there's nothing –

JOE DONOVAN: Constitutional challenge.

GOVERNOR ENGLER: Well, you know, I've heard that, that's inevitable, but does that mean that Mr. Kevorkian is going to go out and in effect find somebody to use to set up a test, I hope not.

JOE DONOVAN: Let's go back to our telephones, Mr. Paul Vincent from Yale is waiting to ask you a question. Mr. Vincent, Governor John Engler is with you live, Ask The Governor.

Q. Good evening.

A. Hi, Paul.

Q. Tell me what the chances are for property tax relief this year.

A. Well, I think they're pretty good, you know, I worked awful hard for Proposal C. And it's interesting, tonight we're getting calls about people who have gotten assessment notices and they're 15 percent, they're 10 percent, they're double digit, and you go back to Proposal C and we had an absolute cap; three percent, and everyone could have been protected under Proposal C.

So, you know, we're not going to have the relief that's as substantial as it would have been under Proposal C, but I think we've got the potential to provide relief. I think we're going to get it. The senate has already passed a bill that I'm

very supportive of, very comfortable with, and I think it's a fair measure.

We're going to do everything that we can. we've increased the state support for the schools, kindergarten through twelfth grade, public schools in the state some 48 percent, that's the share of the general fund - - or that's percentage of general fund increase, in other words, that's about 352 million dollars. We're a little over a billion dollars today coming out of the general fund, probably two and a half billion out of the school aid fund, another billion dollars, I would guess, in property tax relief, so that"s a lot of money.

JOE DON0VAN: Live from Detroit, you're listening to Ask The Governor, telephone lines open now for your calls. Governor John Engler is here and he'll be back with you in just a moment. It's 18 minutes after the hour.

VOICE: You are listening to Ask The Governor via satellite from Lansing on the Michigan Entertainment Network, a division of the Great Lakes Media Group.

(COMMERCIALS/ADVERTISEMENTS)

JOE DONOVAN: We're back with you, this is Ask The Governor live on our statewide hookup. Governor John Engler is here in our studios. We're. going to talk to Kim Snoher (phonetic) of Farmington Hills. Thank you for waiting, we're glad you called and Governor John Engler will answer your questions, so Ask The Governor.

Q. Good evening, Governor.

A. Hi Kim.

Q. Hi. I actually have a question, I have read in a couple papers that there's some legislation up there in Lansing that with this intent will basically eliminate all medical malpractice cases or the great majority. My concern is that of course we all know people who have had cases and we take comfort in knowing that doctors, are accountable, and I'm wondering how you stand on that issue?

A. Well, certainly doctors ought to be accountable, but the cost of malpractice insurance for say Hutzel Hospital has now reachedS40,000 a bed on an annual basis and I think that is beyond holding doctors accountable, and at a level that threatens basic medical care.

And I think that the high cost of malpractice insurance in Michigan -- and it is -- Michigan is four to five times the national average. We are the most expensive state in America in terms of malpractice insurance. I think there has to be reform, and we are not obviously going to have a law that prohibits suing doctors. If doctors are committing malpractice then they ought to be held accountable for it.

I think our law will still be a tough law, but I think it can be a lot more fair and it will result in, I believe, a lot of the nuisance cases being kept out of the courts. I think that it's going to level the playing field, but at the same time the public in many cases today has more to risk from the lack of availability of medical, service than it does the lack of an ability to sue a doctor who may have committed malpractice, and so I think the law's a fair law. I think it's going to be a good law, and it's a reform that's long overdue.

JOE DON0VAN: Mr. Ken Dicken (phonetic) of Royal Oak is waiting to ask you his next question. Mr. Dicken, Governor John Engler is with you live, so Ask The Governor.

Q. Good evening, Governor, how are you?

A. Very good, good evening.

Q. I had a-concern regarding -- just to jump back to the school taxes again.

A. Uh-huh, sure.

Q. I happen to work for a school district in the administration, and one concern has to do with the lottery monies, and we're not so sure that the monies actually making it to the schools. And the biggest concern is with the senate bill, 146, in answer to the senate that talks about reimbursement being available and we don't really feel that there is really any reimbursement out there considering the State's kind of looking for money pretty hard as it is. And the last thing is with your increased funding I don't know if 48 percent is a real accurate figure?

A. It's absolutely accurate in terms of the State budget.

Q. Okay.

A. The figure is fiscal '93 over fiscal '90, that 350 million dollars is the amount of increase in the share of the State budget, you know, the percentage 'of dollars going to education is over a billion dollars out of the general fund.

JOE DONOVAN: We have Mr. --

A. I don't know if our caller was finished, he may have disappeared real quickly there. I was curious because I'd want to know which school district he's in and part of and what they're spending per student.

Q. Are you still there?

A. Oh, good he's still here.

Q. We're spending in the high four thousands.

A. High four thousands, now what level -- I mean, where do you see this trend ending? Because one of difficulties we've had with a number of the schools out there, and the reason they've said we can't afford a property tax cut is the fact that at the negotiating table, the cost of just the employee contracts and the benefits costs have been rising so sharply that there's simply no money left over for anything, and in fact it's taking a substantial amount of increase every year just to cover current costs.

Q. I don't disagree that maybe the salary costs are a little bit out of control, but the health care costs are out of control, maybe that's something else that can be addressed either by you or a new president, but I think there's a lot of concern with myself and people who don't work for schools regarding this reimbursement thing that the State doesn't really have any money to reimburse if the taxes get cut --

A. See, the State's dilemma is this, we're hearing from property taxpayers who are pressed right to the wall, we're working hard to make Michigan a much more competitive state. We need to have more job growth taking place here, while we've been just delighted with the last few months in

terms of Michigan's ranking nationally and in the Midwest, you know, it isn't -- a few months doesn't solve the problem.

And we spent the Eighties really lagging the rest of the country, and so how do we provide Property tax relief if at the same time -- let me give you just an example, State government -- that general fund that I talked about, I said well, we increased education by 350 million dollars, the total general fund '93 over '90 is up two percent, that's it, two percent over those three budgets, and that's pretty restrictive, yet a lot of times I'll look at -- and part of that was because of employee costs in one year were frozen. Now we just negotiated a three-year extension, less than six percent increase over the total of the three years, unless we get corresponding savings in health care.

Well, instead I look -- some of the contracts that are being settled are six and seven percent annually, that's the kind of debate that we've got to have. Is that the property taxpayers' responsibility just to keep on paying or is there a way in which we start to say wait a minute, we're going to have to slow these trends down especially when the increased costs don't relate to higher test scores directly.

JOE DONOVAN: Let's take a little bit of a different look, Governor.

GOVERNOR ENGLER: Okay.

JOE DONOVAN: At the cost of education and of teaching, Bernadine Potts has joined us from Adrian. Good evening, thanks for calling, Ms. Potts, Governor John Engler is here listening to you, what is your question?

Q. My question to the governor is, you know, I just read in the paper where they tapped the teacher, health and retirement fund, that is prefunded for about 127 Million dollars, and I understand this is not the first time this has been done, and I wondered how we can justify erasing a deficit by doing this and when will -- and how does he plan to repay this money?

A. Well, the question that you would want to ask and I think the right question is, is there any risk in the teachers' retirement fund for somebody who is currently retired and drawing benefits, is there any potential risk for somebody who hopes to be a retiree of that fund in the future, and the answer is absolutely not. The question about prefunding benefits, I mean, this was in effect, a savings provision that was added a few years ago for just a portion of the costs of the teacher retirement system, it was not done for State police, it was not done for somebody who works for the social services office or somebody who works in mental health.

And there was no particular argument said well, one fund ought to be treated differently than the others, and so we said rather than cut the school budget and cut programs mid year, reduce money available for kids, we certainly didn't need to have this prefunding savings account sitting there, and that's what we utilized, and I think that was the right decision.

And the Michigan systems are among the very strongest in the nation, and, you know, the private companies have had quite an issue with this of late and that's why General Motors and Ford all took big write-offs, you know, as they started to set aside money for their health benefits, but with the state of Michigan we've got a little different situation. I don't think the State is going to go away, I mean, it should continue to be

in business as long as there's somebody left to tax, the State will pay its bills and I think the important thing is that we've got a secure system.

I am very satisfied that we have a very secure system and so I believe this decision was correct. and it was nothing was taken out of the fund, it was taken out of a reserve account that had not yet gone into the fund.

JOE DONOVAN: Couple seconds we have before we have to take our next break, Governor, you had quick action with the state Legislature in this latest budget cut with that teachers' fund money adjustment we've been talking about- -

(MULTIPLE VOICES)

JOE DONOVAN: -- pleased, are you surprised?

GOVERNOR ENGLER: I"m not surprised, I am just delighted. What we are seeing is a substantial amount of bipartisan support, it's in the house, it's in the senate. It's a whole different attitude. We're seeing it on things like auto insurance reform, which came out of committee today in the House of Representatives –

JOE DONOVAN: Yeah, we'll talk about that in our second half –

GOVERNOR ENGLER: We've got so many good things going on and I'm just excited and pleased, and let's get to the calls.

JOE DONOVAN: Barring a catastrophe, is our budget balanced now until the end of this fiscal year now?

GOVERNOR ENGLER: Yes, '92 is balanced, let me just take a little history real quick. '90 when we had to close the books -- I wasn't even in office -

JOE DONOVAN: (Inaudible) right.

GOVERNOR ENGLER: -- closed it in the red, 330 million dollar deficit, and in '91 when I took office that year, was three months gone, we had about million and a half dollar problem, so combined a 1.8 billion dollar problem.

And that 1.8 billion dollar problem today has been dealt with such that we were able to close the books in '92, were balanced, closing them on '93 next year, or the end of this year, they'll be balanced. We still have a lot of problems, still are tight for cash, we still have to borrow short-term to pay the refunds, that kind of stuff, but it's much better today than it was just 24 months ago.

JOE DONOVAN: We're live from Detroit this is Ask The Governor, the February edition, plenty of time for your calls, so if you have something, give us a call. It's 30 minutes after the hour.

VOICE: You are listening to Ask The Governor via satellite from Lansing on the Michigan Entertainment Network, a division of the Great Lakes Media Group.

VOICE: I'm Paul Snyder with a news update on Ask The Governor, and as you heard a few moments ago, Governor Engler today signed into law a bill that bans assisted suicide in Michigan effective immediately. The initial bill was due to take effect at the end of March, the ban is aimed squarely at Jack Kevorkian who has helped 15 people commit suicide

since 1990. In signing the bill the governor said Kevorkian has clearly crossed the lane. An attorney says Kevorkian intends to defy the ban.

Why did it take police officers two hours to transport an injured Rodney King from one hospital to another on the night he was beaten two years ago? Federal prosecutors are alleging the officers who arrested King detoured to their station to show off the beating victim to colleagues. King's federal trial on charges his civil rights were violated got underway today in Los Angeles.

President Clinton has announced the United States is air dropping relief supplies to Bosnian war victims, but so far it is unclear if other nations intend to join in. An administration source says The White House is hoping to make it an international effort, but the president's statement makes no mention of any other countries taking part. There's also no word on when the operation is slated to begin.

Washington and Moscow have selected a date for the first summit between President Clinton and Russian president, Boris Yeltsin, but they still have to select a site. Secretary of State Christopher and his Russian counterpart announced today the summit will take place April 4th. The White House said later the two presidents will meet at a neutral site.

Sources say the Clinton administration has indicated it will look the other way if law makers want to make deeper spending cuts in programs such as the Super Collider or the Space Station. The president said again today that he supports both programs, but he also said others disagree and added the programs may be debated in Congress.

A federal jury has convicted three men in the first fatal car jacking prosecuted under a new federal law. The defendants in Orlando, Florida were found guilty in the execution-style killing of two men.

I'm Paul Snyder with a news update on Ask The Governor.

VOICE: This is Ask The Governor, Michigan Governor John Engler is standing by to take your telephone calls, answer questions, discuss problems, issues and successes facing our great state. Here's how you can be a part of this evening's program. If you're in the Metropolitan Detroit area call 589-9595; if you're calling from anywhere else in Michigan, call the following number collect area code (313) 559-9595.

Now, here's the moderator of Ask The Governor, Joe Donovan.

JOE DONOVAN: Of course governor John Engler is here in our Detroit studios with us this evening. Governor, a little news tidbit, this is one of the stories we'll be following along our network this evening. Police have gone to Jack Kevorkian's Royal Oak apartment tonight executing a search warrant on behalf of the Roseville Police Department, so the Royal Oak Police went to Kevorkian's apartment on request of Roseville Police for reasons unspecified, so perhaps before this hour is done we'll learn more.

There's another developing story of course, Governor, will Dennis Rodman be traded by the Pistons? 90 minutes now until the NBA trading deadline and if anything should

break on that we will have a report live from The Palace of Auburn Hills.

GOVERNOR ENGLER: We'll do our instant analysis of the trade and see if that first-round draft choice is, the right one.

JOE DONOVAN: But every time you sit down with a really tough series of decisions to make and fights with Democrats and fellow Republicans and the Legislature and all the other problems you face on a daily basis, you probably must tike some solace in knowing at least you don't have to coach in the NBA.

GOVERNOR ENGLER: That's true.

JOE DONOVAN; Let's go to Mr. Richard Hilligman (phonetic) of West Bloomfield, sir, thank you for waiting. Governor John Engler is here now, what is your question, Mr. Richard Hilligman, West Bloomfield.

GOVERNOR ENGLER: Yes, I think so, sir?

JOE DONOVAN: Yes, you are live.

Q. Good evening, Governor.

A. Good evening.

Q. My question for you although, it's been bantered around pretty good tonight, about property tax.

A. Uh-huh.

Q. My property taxes basically doubled this year and I know that there's things going on in the Legislature to try and do some type of rollback, will those rollbacks take into account the fact that some people have received these kind of tax increases and be able to roll back to say two-year-ago levels?

A. Well, we'd love to go back to the freeze obviously, but one of the problems we had with the freeze, we did it for one year, and we said at the time this was a Bandaid, it was temporary.

And went to the ballot, as you know, vigorous debate over Proposal C which had the cap across the board, and when that failed and the freeze was over, we've got these bumps out there which are pretty darn dramatic for some folks like yourself. We -- in a rollback debate, one of the problems you've got is a constitutional one, and so I think we can do some across-the-board reductions, but you're going to have situations where people that maybe sot a 20 percent hike in an assessment, if they got 10 percent break obviously still have a net increase in their property taxes.

And you know our homestead property tax credits costing a billion dollars a year now, that has been paying out more and more and more, and I've just argued that we've got to change our whole attitude about property taxes and try to put some limits in there, and this has been a big debate in the legislature because of the school finance side.

Well, we've sat down now with house members beginning, well, earlier this week, again today and we're going to keep sitting down with them and hopefully we can find a common ground here, because folks like you that are setting the assessments can also help out by calling and

writing and saying, look, don't forget the property taxpayers when you start talking about schools.

JOE DONOVAN: Mr. Bob Couples of Farmington Hills also waiting to ask a question. Governor John Engler is here, sir, what is your question for the governor?

Q. Hi, Governor Engler, good to talk to you.

A. Good evening.

Q. As you know driving your merry Oldsmobile down the highway --

A. Got here tonight that way.

Q. Why does Michigan allow the highest truck weights in the nation to destroy our highways?

A. Well, that's something we've talked about on this program before, I mean, we've had this axle weight approach, we require more axles and we -- the Department of Transportation has got a study underway on this. It is one thing that we're evaluating.

The history of Michigan is such that we've had these higher truck weights and more axles, we are looking at what we ought to do. One of the things I'm trying to argue for also is the end of economic regulation of trucking in this state, which arguably forces more trucks out there on the road than would necessarily need to be there, and certainly changes sometimes the patterns just for economic purposes alone, we are studying this.

I have said that I am open on this question, we don't feel that some of the highway usage patterns and some of the damage that we've received is in line with what's going on around the country. So when we know more, maybe this is something we can act on, I have no allegiance to higher truck weights or to refusing to look at options.

JOE DONOVAN: Couple seconds before our break. Clinton wants to send some more money to Michigan and all the other states; assuming his plan goes through, is there enough in it for Michigan to fix these potholes?

GOVERNOR ENGLER: Well, we hope that.

JOE DONOVAN: (Inaudible).

GOVERNOR ENGLER: We've made quite a deal out of the fact that the congressional compromise on transportation sent a lot of money our way, but when we start looking at the fine print, turns out they didn't fully fund it. President ought to do that as a first step, that's a good economic stimulus, and it's nothing more than was already passed by congress a couple of years ago. I hope that will help.

But the caller's question's the important one, if we're going to fix roads, then we'd better make sure that we're doing the right things with them, otherwise we're wasting money.

JOE DONOVAN: We're live from Detroit, you're listening to Ask The Governor. Governor John Ensler back with more of your calls in just a moment. It's 38 minutes after the hour.

VOICE: You are listening to Ask The Governor via satellite from Lansing on the Michigan Entertainment Network, a division of the Great Lakes Media Group.

(COMMERCIALS/ADVERTISEMENTS)

JOE DONOVAN: We are back with you at 40 minutes after the hour, let's go back to Farmington Hills, Mr. Richard Corey has been has been waiting to ask his question. Governor John Engler is listening, so Mr. Corey Ask The Governor.

Mr. Richard Corey of Farmington Hills, you with us?

Q. Yes, I'm with you.

JOE DONOVAN: Okay, Ask The Governor, sir.

Q. Governor, how are you this evening?

A. Good, Mr. Corey.

Q. Okay. Governor, I just was curious as to what the status of the automobile reform bill is doing and why at all is the State and the Legislature even considering the bill when citizens overwhelmingly defeated it?

A. Well, I've got good news for people who want auto insurance rates cut and who believe that reform is necessary like I do. Legislation was reported out of committee in the house today and will be up for debate and consideration on the floor of the House of Representatives next week, and this legislation is not like what was voted on, what this does is to restore the Michigan no-fault law, which is one of the finest

no-fault laws in America in the middle 1970s when it was passed in its original intent.

And part of no-fault is that regardless of fault, if I'm insured and you're insured and we're in an accident, we each go see our own company get our car fixed, get our injuries fixed and if it's rehabilitation that's necessary, that gets taken care of too. And this law has been eroded and so what we have is no-fault benefits and then followed by lawsuits, and we need to limit the lawsuits. And this bill does do that and I think it's a very proconsumer measure.

JOE DONOVAN: Does it make our auto insurance cheaper?

GOVERNOR ENGLER: Yes, it does. It's got a mandated 16 percent cut in auto insurance premiums and I think it's also much more effective in rewarding good behavior on the part of drivers. Safer drivers with good habits get better breaks, more breaks and what's wrong with that?

JOE DONOVAN: Mr. Paul Burger of Southfield, thank you for waiting. Governor John Engler is listening so, Mr. Burger, what is your question for the Governor.

Q. Good evening, Governor, how are you tonight?

A. Good, Mr. Burger.

Q. That's good. Governor, I wanted to say that I strongly support you a hundred percent, but I am a little bit concerned about one thing, and that is in light of what happened to President Bush and really how he -- really attacked with all the liberal news media coverage, I hope that you're getting

ready for your reelection campaign now and are going to give it a hundred percent effort?

A. Well, I tell you, whenever there's a campaign I try to give it a hundred percent, but at this point we got a lot of work to do and I do programs like this so I can talk directly to voters. I don't have to, you know, worry about being filtered out and, you know, people are tired of elections right at the moment, I think give everybody a little bit of a rest and give them a little credit.

And there's a lot of time before 1994 and I think sometimes that the best politics is simply go do your job and let the people -- you know, give them credit for being able to see through things and sort things out. And that's how I've always approached it in the past and I think that's pretty good advice for the future.

JOE DONOVAN: Mr. Dave Mallet of Rochester Hills, governor, has joined our little electronic town meeting tonight, and, Mr. Mallet, thank you for holding on. Governor John Engler is listening, so Ask The Governor.

Q. Hi, Governor.

A. Dave, yes.

Q. Yeah, hi, I was calling, my concern is I just can't help believe that our society is going downhill very quickly due to the lawsuits, and my question is would it be possible maybe through a constitutional amendment to make it impossible for someone to sue the Department of Transportation for potholes or light pole falling down because I've heard that as much of

50 percent of the budget in the Department of Transportation is spent in legal matters?

A. It's not quite that high, it has been high. We had a record set last year, the first year in oh, several, the lawsuits against the State, the judgements were way, way down and we've taken a posture, we're going to be very aggressive, we think if someone brings a suit against us and it's frivolous that we ought to try and collect back from those people who are bringing frivolous lawsuits and the State of Michigan shouldn't be the state of confusion when it turns time to fend ourselves in these lawsuits.

We have a strong governmental immunity law, it at times gets twisted a little bit in some of the interpretations, but I think when you see us dealing with the medical malpractice issues, with auto insurance, the type of tort reform now that's finally being talked about is very, very protaxpayer, proconsumer, and I hope that we're headed strongly in the right direction, and I appreciate your concern and certainly share it.

JOE DONOVAN: Diana Nelson of Almont, thank you for calling. Governor John Engler is now listening to you, so Ms. Nelson what is your question for the Governor?

Q. Well, I'd like to know what Governor Engler thinks of the Michigan model that's being taught in our public schools throughout the state?

A. Well, the Michigan model of course is sort of what the shorthand description for a curriculum that is a health education curriculum, but there are many aspects of that curriculum that have been found objectionable by people

who've looked at it and there are also many people who strongly support that curriculum.

First of all, the point that needs to be stressed here regardless of your position is that this curriculum and other curriculum is a local decision made by local boards and sometimes there's an effort to say, and sometimes local officials are guilty of this, say well, the State made us do it. That is not the case. There are school districts in Michigan who have said no, we're not going to use the Michigan model, others after a long debate have said we are going to use it. And I guess my opinion on it is that the State ought to make sure that everybody is informed what their choices are and then they ought to decide.

I am concerned about the fact that our test scores in math are too low, our test scores in science are too low, our reading isn't good enough, and the overall outcomes that we're setting need --

(SIDE A ENDED)

A. -- the local people to decide.

JOE DONOVAN: Skip over to Vicksburg now, Mr. Jim Frye is waiting, Governor, and, Mr. Frye, Governor John Engler is listening to you. I hope that wasn't you hanging up your phone, Mr. Frye. Well, I'm afraid that the very last second we lost our caller, so we'll move along and if we can reestablish contact we'll get back to him.

Let's go over to Farmington Hills where we have a caller waiting, that's Mr. Carl Davey, I believe it is, sir, is that right? How are you tonight, sir, from Farmington Hills?

GOVERNOR ENGLER: Mr. Davey, are you there?

JOE DONOVAN: Well, it sounds as though we're having some bad luck.

GOVERNOR ENGLER: We ' re –

JOE DONOVAN : Was it something that you said?

GOVERNOR ENGLER: I don't think so, but --

JOE DONOVAN: We have a question on health care and that is from Troy- Hello Mr. Goziyegly (phonetic), did I get your name right?

Q. Goziyegly.

JOE DONOVAN: Very good, sir, Governor John Engler wants to hear what you have to say, so Ask The Governor.

Q. Okay, I'm a doctor, I see patients, Governor Engler, that have no insurance and they go to hospitals and they are charged more than what Blue Cross would ordinarily imburse these hospitals. What can be done to protect these patients from having to pay more? They're down and hurting, they're unemployed, they've lost their health coverage and here they're willing to pay but they get charged more than what Blue Cross would ordinarily imburse.

A. Well, I think that's really a shame, I don't understand why that would be set up. Now, you know, it just doesn't -- isn't fair to say to one, we're going to charge you at a lot higher rate maybe because the next person in the door isn't going to pay us at all, I mean, that doesn't work out very well. I hope

all of this is addressed as we go through the national health care debate, because universal coverage is one of the key components. It's something that as the Governors Association sat down to give some recommendations to the president, we said you've got to have universal coverage, everybody's got to be in the system because otherwise you'll end up with all this cost shifting going on. And what you're describing looks like a classic case of cost shifting, so access and coverage are key components.

I'm optimistic that we're going to see something worked out and we're continuing in Michigan to see everything -- do everything that we can, but I have to tell you, our focus has been on trying to help through our caring children program, children in those families where there's no insurance and these are just the young children, it isn't nearly adequate enough.

JOE DONOVAN: You're listening to Ask The Governor, we'll have more of your calls and questions in just a moment. It's 49 minutes after the hour.

VOICE: You are listening to Ask The Governor via satellite from Lansing on the Michigan Entertainment Network, a division of the Great Lakes Media Group.

(COMMERCIALS/ADVERTISEMENTS)

JOE DONOVAN: We're back with you at 52 minutes after the hour. Governor John Engler is taking more of your calls. Let's waste no time and get to Mr. Bob Atchuloni (phonetic) of Farmington. Thank you for holding, Governor John Engler is now listening, so please Ask The Governor, Mr. Atchuloni. It sounds as though our telephones, suddenly

the Gods of technology have suddenly decided to frown on us. Punch this button really good and hard, Mr. Atchuloni of Farmington, are you with us.

Well, let's move over to Royal Oak where we have a caller and Bill Stephenson, is that you, Mr. Bill Stephenson of Royal Oak?

Q. Good evening, Governor.

A. There we go, good evening.

Q. I heard a story on this morning's broadcast, maybe Mr. Donovan covered it, I heard that warren city council was covering up complaints given to the city council during the recent meeting about the understaffed 911 service, and my concern would be with public safety being a big priority, why would the Warren City Council be so high-handed about that in wanting to cut that complaint down?

A. I don't know, and haven't heard the story so I really can't comment on it. I would say that 911 service has almost become one of those basic services that we expect. In fact, in the last session of Legislature it was worked out where for a very, very small charge on the phone bill, we could have 911 services across the state, so even when you're traveling in some of the more rural areas of the state you'd still have the ability to call emergency help with 911.

If there's a problem like that, I would say that it ought to be taken up locally, if it still persists, I don't know what we have at the state level, I could take a look at it. We have a 911 advisory committee, perhaps they could give you some advice, and that's about all I could say on that without more

information. Contact the office directly or, you know, in some other -- maybe talk to local Legislature and let's see if we can't get an answer to you.

JOE DONOVAN: Mr. Carl Davey of Farmington Hills joining us live. Mr. Davey, good evening, Governor John Engler is listening to your questions, so go ahead and Ask The Governor.

Q. Good. evening, Governor.

A. Good evening.

Q. Governor, it's been almost 40 years since Brown versus Board of Education and it was a great Catalyst for a lot of minority groups to be included in the society.

A. Sure.

Q. One of the groups that seems to have been left back lagging throughout the Sixties and a lot of the social movements that have occurred over the last three or four decades are the people with disabilities and challenges, either physical or emotional or mental, and I was wondering, the topic of budgetary restraints in education being a primary motivating factor in a lot of governmental decisions, what is your views on inclusive education?

A. Well, I think that Michigan's been a national leader, certainly the Michigan Special Education Law is even broader than the mandate spelled out under the federal legislation, and while the different school districts have approached that differently, and intermediate school districts also play a role with the special education funding of the program, I think

inclusive education has been extensively used in the state of Michigan in many school districts.

It runs up against in some situations, in some certain specific cases behavioral issues; you know, the ability of one teacher in a classroom with 24 other students to be able to handle a specific type of problem, but in some cases that's been dealt with by teacher's aides, other means of coping. It is all individualized and of course that's why Michigan, again, a student who qualifies for services under special education has his or her own individualized education plan. In fact I use that as an example of what I want to see with some of the adult education, worker training programs is an individualized plan for how do we get someone productive and involved, and so I hope that that answers the question.

JOE DONOVAN: Mr. Chris Churchill from Lansing has been able to rejoin us, sorry that the phone system dropped out on you, Mr. Churchill, but Governor John Engler is listening, so what's your question for the governor tonight?

Q. My question is back to the property tax issue.

A. Okay.

Q. I was curious if anyone has given any serious thought to dropping property taxes altogether and going to a higher sales tax, it seems to me that --

A. Uh-huh.

Q. -- by doing that that it would give initiative to businesses to move back to the state?

A. Well, that has been talked about from time to time. We have tried various proposals to get us to that point. None of those have been successfully passed. The Legislature cannot do this by themselves, the constitution of the State of Michigan limits the sales tax to four percent, so any proposal to switch property tax and replace it with sales tax has to be approved by the voters and the voters have to have an ironclad guarantee that two things are true. One, that their property taxes, if they cut them, actually remain cut, or if they're eliminated that they remain gone, and at the same the voters I think want to know that there's going to be a fair distribution formula for the schools.

If we can satisfy those two questions those kind of proposals might pass. I've said that the first step is to show people we can cut taxes even a little bit, and I've tried 20 percent reductions and we're still fighting the fight.

JOE DONOVAN: Speaking of fighting fights, Governor, we have been fighting the clock for the last 55 and a half minutes, and time is run out on our February get-together. We will see you again in approximately four weeks I'm sure, and –

GOVERNOR ENGLER: You will indeed. I'll look forward to being back here.

JOE DONOVAN: And when you go to Port Huron tomorrow, you're going to announce another span for the Blue Water Bridge; is that right?

GOVERNOR ENGLER: Well, that's going to be the story tomorrow, if I announce that tonight, what do I have left, but

I think that there's going to be very good news for the people of Port Huron.

JOE DONOVAN: I think you've just answered our question.

VOICE: You've been listening to Ask The Governor, a telephone call-in program featuring Michigan Governor, John Engler, live from Detroit. Join us again next month when Governor Engler will be back with us to take your calls, answer your questions and discuss the important issues facing Michigan.

Ask The Governor is a production of WWJ News Radio 95 Detroit. Networking facilities provided by Great Lakes Media Group of Lansing. This evening's moderator, Joe Donovan.

(END OF EXHIBIT A)

CERTIFICATE OF TRANSCRIPTION

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

I hereby certify the transcription of the foregoing proceedings. These proceedings were recorded on audio tape; said audio tapes were not recorded by me nor under my supervision or control. I certify that ,this is a full, true, complete and correct transcription of the audio tapes.

/s/ _____
Medina Balderas
Notary Public
Waynenty, Michigan

My Commission expires: 6.11.03

EXHIBIT C

STATE OF MICHIGAN
COURT OF APPEALS

Maura D. Corrigan
Judge

900 First Federal Building
Detroit, Michigan 46226
Telephone 256-9285

[Received March 26, 1996]

March 25, 1996

Attorney Grievance Commission
Marquette Building, suite 256
243 w. Congress
Detroit, MI 48226

Re: Request for Investigation of Geoffrey N. Fieger (P30441)

Dear Sir or Madam,

The purpose of this letter is to request an investigation by your office into acts of professional misconduct on the part of Geoffrey N. Fieger (P30441). I am reporting these acts of misconduct by Mr. Fieger pursuant to my ethical obligation to do so under the Michigan Rules of Professional Conduct, Rule 8.3(a).

I.

(A).

On February 11, 1996, THE OAKLAND PRESS published an article in which Mr. Fieger alleged a conspiracy between the Oakland county Prosecutor and myself to improperly influence the outcome of the criminal trial of Jack Kevorkian (Oakland Circuit Court Nos. 93-129832-FH & 94-130248-FH):

> Geoffrey Fieger wants an investigation into whether Oakland County Prosecutor Richard Thompson conspired with a Michigan Court of Appeals judge to deny an impartial jury for jack Kevorkian's assisted suicide trial...[Fieger] wonders if Thompson and [Court of Appeals] Judge Maura D. Corrigan, who know each other, conspired to bring a Kevorkian case appeal before Corrigan...Fieger claims that the object of the alleged conspiracy is to get the juror questions issue before an appeals judge panel that will rule in Thompson's favor...."In every capital punishment case you ask jurors about their religious beliefs," said Fieger. "This is a fix, and the Oakland County prosecutor is looking for judges that will help him fix it." [Bob Gritzinger, *Fieger wants investigation of Thompson*, THE OAKLAND PRESS, February 11, 1996, at A-12 (Appendix A).]

(B).

On February 12, 1996, at approximately 3:45 p.m., Mr. Fieger was quoted on WWJ-AM, radio station 950, as saying that a decision by Oakland Circuit Court Judge Jessica Cooper

in the criminal suits against Jack Kevorkian was a victory for the defense because it "thwarted the conspiracy between the Court of Appeals and the Oakland County Prosecutor's Office."

(C).

On February 15, 1996, THE DETROIT NEWS published an editorial which stated:

> Over-the-top attorney Geoffrey Fieger has been attempting to use religion as a reason for rejecting jurors in the trial of suicide doctor Jack Kevorkian. And when a state appeals court was assigned to hear the merits of this outrageous notion, Mr. Fieger yelled foul on grounds of religion as well. "I had three right-wing Catholic judges deciding against me," he asserted. [Robert H. Giles, Editor and Publisher, *The Bigotry of Geoffrey Fieger*, THE DETROIT NEWS, February 15, 1996, at 12A (Appendix B).]

(D).

On February 25, 1996, THE DETROIT NEWS published an article in which Mr. Fieger was quoted as saying this about the Court of Appeals Judges: "They're squirrels, mollusks and lizards...and if they don't like what I am saying about them, let them come down here and tell me." John Larabee, *Kevorkian, Fieger hog limelight during trial,* THE DETROIT NEWS, February 25, 1996, at B1 (Appendix C). Mr. Fieger later attempted to retract that statement by saying he was referring to "politicians and people in high office in Lansing" (Appendix D).

II.

The allegations of a conspiracy between myself and the Oakland County Prosecutor's Office were made by Mr. Fieger without any basis in fact and have, in effect, unjustly accused me of conspiring to violate the following:

1). The separation of powers clause, Const. 1963, art. 3, §2, by trying to control or influence a criminal prosecution, *see Genesee Prosecutor v. Genesee Circuit Judge*, 386 Mich 672, 683-684; 194 NW2d 693 (1972).

2). My oath of office, Const 1963, art 11, §1, by failing to faithfully discharge the duties of office, *see In the matter of Hague*, 412 Mich 532, 554; 315 NW2d 524 (1982).

3). The penal statute of obstruction of justice, MCL 750.505; MSA 28.773, by agreeing with the Oakland County Prosecutor to engage in "oppression and tyrannical partiality by judges...on the administration and under colour of...office" (one of the common-law offenses recognized in Blackstone, Commentaries [1890], *see People v. Thomas*, 438 Mich 448, 457 n 5; 475 NW2d 288 [1991]).

4). The Michigan Code of Judicial Conduct: Canon 1, by undermining the "integrity and independence of the judiciary", Canon 2A, by creating "impropriety and appearance of impropriety"; Canon 2b, by engaging in conduct detrimental to "public confidence in the integrity and impartiality of the judiciary"; and Canon 3A(1), by failing to be "unswayed by partisan interests, public clamor, or fear of criticism."

III.

I believe that Mr. Fieger has violated the following statutes or rules in making the aforementioned baseless and slanderous statements.[1]

1). The penal statute for slander, MCL 750.370; MSA 28.602, by falsely and maliciously accusing me of committing a criminal act, to wit: conspiracy to commit obstruction of justice.

2). Michigan Rules of Court 9.104, by engaging in conduct that (a) is prejudicial to the proper administration of justice, (b) exposes the legal profession or the courts to obloquy, contempt, censure, or reproach; © is contrary to justice, ethics, honesty, or good morals; and (d) violates the standards or rules of professional responsibility adopted by the Supreme court.

3). MRPC 8.2, by making a statement with knowledge of its falsity or with reckless disregard as to its truth or falsity concerning the integrity of myself and my position as judge of the Court of Appeals.

4). MRPC 8.4, by (a) violating or attempting to violate the rules of Professional Conduct; (b) engaging in conduct involving misrepresentation, where such conduct reflects

---

[1] Mr. Fieger's statements do not qualify as protected speech under the First Amendment to the United States constitution. *See New York Times Co. V. Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964); *Gentile v. State Bar of Nevada*, 501 US 1030; 111 S Ct 2720; 115 L Ed 2d 888 (1991); *Hodgins v. times Herald Co.*, 169 Mich App 245, 253; 425 NW2d 522 (1988).

adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer; and (c) engaging in conduct that is prejudicial to the administration of justice.

IV.

In accordance with MCR 9.112, I request that you investigate the aforementioned acts of professional misconduct by Mr. Fieger.

Sincerely,

/s/ _____
Maura D. Corrigan
Judge, Michigan Court of Appeals

cc: Martin M. Doctoroff
Chief Judge, Michigan Court of Appeals

EXHIBIT D

STATE OF MICHIGAN
ATTORNEY GRIEVANCE COMMISSION
Marquette Building
243 W. Congress, Suite 256
Detroit, Michigan 48226-3259
Telephone: (313) 961-6585
Fax (313) 961-5819
www.agcmi.com

[Received April 27, 2002]

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Karen Quinlan Valvo
Richard B. Poling, Jr.

Robert L. Agacinski
Grievance Administrator
Robert E. Edick
Deputy Administrator
Cynthia C. Bullington
Assistant Deputy Administrator

Associate Counsel
Susan E. Gillooly
Donald d. Campbell
Wendy A. Neeley
Ruthann Stevens
Stephen P. Vella
Patrick K. McGlinn
Frances A. Rosinski
Emily A. Ramsey
H. Lloyd Nearing
Kimberly L. Uhuru
Nancy Alberts

April 26, 2002

PERSONAL AND CONFIDENTIAL

Hon. Maura D. Corrigan
Chief Justice
Michigan Supreme Court
500 Woodward Avenue, #2000
Detroit, MI 48226

RE: Hon. Maura D. Corrigan as to Geoffrey N. Fieger
File No. 0906/96

Dear Chief Justice Corrigan:

Your complaint of 1996 has been resurrected and reviewed by the Attorney Grievance Commission on April 24, 2002. A decision on this matter had been deferred in 1998 by the Grievance Administrator in anticipation of the resolution of the First Amendment issue raised in this matter. We had been awaiting a decision by the Attorney Discipline Board or

the Court. Formal action had begun on other cases involving the same issue as can be found in this matter. And yet, to this date, that issue has not been answered, and those cases are still pending before the Attorney Discipline Board and are awaiting resolution.

Because so much time has passed, and because the issue you raised will eventually be resolved as to this Respondent in the other matter, the Attorney Grievance commission has determined to direct that this Request for Investigation be dismissed.

I am sorry this matter was held for so long. If I can answer any questions you have or be of further assistance to you, please do not hesitate to contact me.

Very truly yours,

/s/ _____
Robert L. Agacinski
Grievance Administrator

RLA/mmp
cc: Geoffrey N. Fieger
David J. Cooper
(Respondent's Counsel)

EXHIBIT E

VARIOUS EXCERPTS
LABELED A201-A233

[p. A201]

National Law Journal
October 28, 2002
Page A9

For trial lawyers, 2000 was an 'expensive lesson'
By Emily Heller
Special to the National Law Journal
Election 2002

[Photo with caption: 'Robert P. Young:
The incumbent's TV message in a decorous campaign year is "I'm a good guy. Vote for me."']

The Wizard of Oz isn't making an encore appearance in this year's Michigan judicial race.

A song from the movie provided a memorable moment in the 2000 state Supreme Court campaign, in which three Democrats sought to oust three Republicans in a $15 million all-out war for control of the bench. The race saw attack ads by trial lawyers and business groups.

One by the Michigan Trial Lawyers Association mocked the Republicans, showing cartoon trees alongside a yellow brick road chanting, "Markman and Taylor and Young – oh my!"

Despite the record spending and attention-getting tactics, the Republicans were re-elected by wide margins.

This year's races are comparatively decorous, says Justice Robert P. Young Jr., one of three Republican incumbents featured in the 2000 send-up, and who is now running for a full term.

Because incumbents retained office, "there was a feeling these kinds of ads would not necessarily survive a second round," says Allan Ashman, director of the Hunter Center for Judicial Selection at the American Judicature Society in Chicago.

"We got waxed," says Alan C. Helmkamp, president of the Michigan Trial Lawyers Association, which spent $5 million on the campaigns. "I think we learned an expensive, unfortunate lesson two years ago. No amount of money and a tremendous grassroots effort would overcome the incumbency advantage they enjoyed."

This year, "the whole landscape and dynamic is different," says Helmkamp.

Trial lawyers are cheering the two Democratic challengers, J. Martin Brennan, a Sterling Heights, Mich., general practitioner, and Maggie W. Drake, a Wayne County circuit judge in Detroit, but they aren't opening their wallets. By press time, Brennan had reported only one contribution, $10,000 from the Trial Lawyers Association.

Instead, plaintiffs' bar members are contributing to candidates for Michigan's top state offices, notably Democratic gubernatorial candidate Jennifer Granholm.

The 2002 high court elections are a "nonevent" because "nobody is really putting any money into the campaigns," says Dennis W. Archer, a former state Supreme Court justice, past Detroit mayor and president-elect of the American Bar Association. Two weeks before the election, the Michigan Chamber of Commerce unveiled a television ad supporting the Republican incumbents – the first ad in the 2002 elections. The chamber spent more than $3 million on four TV commercials in 2000.

Bob Labrant, the chamber's general counsel and senior vice present of political affairs, won't say how much the chamber has raised or how much it plans to spend on the election.

The ad praises the incumbents for bringing "common sense back to the bench." it says that until recently "special interests were everywhere" and that "some rulings even seemed to put criminals' rights ahead of victims' rights." The incumbents, it says, "understand the rights of victims and make our courts work for taxpayers, not special interests."

The ad is considerably more modest in its production values than some from 2000, including a chamber commercial that offered a reply to the trial lawyers' *Wizard of Oz* spot, delivered by an actor performing from a large fake tree.

"I liked my dancing tree," LaBrant says.

The only other television ad in the Supreme Court race was to be sponsored by the campaign for Young. At press time, he said he had raised about $500,000 and was planning to run a "plain vanilla" television ad saying, "I'm a good guy. Vote for me."

Young says his campaign seeks to "educate the public about the fact that the judiciary has been eating their lunch for the last 40 years, usurping their self-governing rights."

Judiciary's role

The five-justice Republican majority, which Young calls "judicial traditionalists," have made a practice of overruling precedents, finding that previous courts usurped the Legislature's lawmaking authority. Judges shouldn't shape public policy but determine the plain meaning of laws, Young says.

Though trial lawyers chafe at the majority's philosophy, which, they argue, minimizes people's access to courts, their political focus is elsewhere. A Democratic sweep would produce a 4-3 court majority, but no one predicts that.

Voters will choose two from seven candidates: the Republican incumbents, Young and Elizabeth A. Weaver, Democrats Brennan and Drake, Libertarians Michael L. Donahue of Detroit and Bruce H. Yuille of Clarkston and Green Party candidate Donnelly Wright Hadden of Ann Arbor. Political parties nominated the candidates.

The race is nonpartisan, so the ballot will not contain party designations but will identify Young and Weaver as justices of the Michigan Supreme Court.

[p. A202]

CASSETTE TRANSCRIPTION OF EXHIBIT G

VOICE: Michigan has over 600 experienced judges, but only seven sit on our Supreme Court. Marietta Robinson wants to join Michigan's highest court, but Marietta Robinson has never been a judge before. Robinson doesn't have a single day of judicial experience.

Thomas Fitzgerald has been a judge, but a law school study found he's the most reversed judge on Michigan's appeals court. Time and again his decisions have been overturned. When Fitzgerald's not getting overturned, he's busy reversing criminal convictions 38 percent of the time.

Then there's Ed Thomas. He's taken hundreds of thousands of dollars from personal injury lawyers who could appear before his court. This may be good for personal injury lawyers and for Ed Thomas' campaign, but it's bad for Michigan.

Thomas, with all that special interest money, Fitzgerald with the wrong experience and Robinson with no experience at all; what kind of justice is that?

Paid for by Michigan Chamber of Commerce.

(REPEATING)

VOICE: Learn more at www.michamber.com.

Paid for by Michigan Chamber of Commerce.

[p. A203]

(END OF EXHIBIT G)

[p. A204]

CERTIFICATE OF TRANSCRIPTION

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

I hereby certify the transcription of the foregoing proceedings. These proceedings were recorded on audio tape; said audio tapes were not recorded by me nor under my supervision or control. I certify that this is a full, true, complete and correct transcription of the audio tapes.

/s/ _____
Medina balderas
Notary Public
Waynenty, Michigan

My Commission expires: 6.11.03

[p. A205]

Steve Markman @ MSMS Meeting, 5/17/2000

Well good morning, it's a great honor to be here today. I had the opportunity to speak before some of your colleagues several weeks ago. If some of you were here at the time I

apologize for () I'll be sharing some thoughts I already shared in the past, but I'm really honored to be here.

I'd like to tell you just a little bit about a supreme court candidates here in Michigan because it's going to be a much different kind of campaign than I think you have ever seen before, much different kind of judicial campaign then has ever been in the State of Michigan in the past.

I'm going to be running for reelection along with two of my colleagues, Justice Clifford Taylor and Justice Bob Young, and obviously together we're three sevenths of the Michigan Supreme Court, and all three of us have been appointed to the Court just over the last few years.

Um, let me say that there's never been a clearer choice for the Michigan Supreme Court then we're going to see this year. Historically, Supreme Court campaigns have been somewhat sleepy affairs, not given a lot of attention, but it's going to be much different this year, and let me give you one (edition) of that fact if I can.

Um, more money is going to be spent trying to remove Justice Taylor, and Justice Young and myself from office than has ever been spent in any Judicial campaign by far in the history of Michigan. But it doesn't end there. More money is going to be spent trying to remove Justice Taylor, Justice Markman, and Justice Young from office than has ever been spent, almost certainly, in any judicial election in the history of the United States of America. It's going to be that costly of judicial campaign, and Michigan is not accustomed to these kind of campaigns, in fact, nobody is accustomed to the kind of campaign that I believe we're going to see this year.

Individual law firms, not a community, but a individual law firm, for example, in the Detroit area: Summer Schwartz has committed themselves to spending $500,000 to remove us from office. This is about three times what was spent on total campaigns for the state Supreme Court as recently as 6 years ago. So it really is quite a different kind of campaign, and uh, I hope you approach it that way in considering the kinds of decisions that you're going to be making this year.

Why is there such an effort to remove us from office? () short it's because there is a new philosophy on the Michigan Supreme Court for the first time in over half a century. And I wouldn't recoil if someone described this as a conservative philosophy, because that's what it is. But it's not a conservative political philosophy, we're not pro-Republican or anti Democratic Party, or pro any interest group, or anti any interest group because that's not what judges or justices should bring to their responsibilities. We're not pro medical profession, or anti medical profession, pro-hospital, or anti hospital, because, again, that's not how judges should approach their responsibility.

But let me tell you a little about the values of our court. Because I think the values of our court are the kinds of values that most of you understand, I hope, appreciate, () I believe an overwhelming number of people in Michigan, whatever their partisan background, will understand the kind of values that we're talking about. And these values that I'm going to describe to you briefly used to be values that we all took for granted in our legal system. But over the last decade or two, our legal system, I would suggest, has been transformed, and is undergoing a continued transformation, in ways, that I would suggest, are not in the interest of, um, not only the

medical profession but um, productive professions generally throughout society.

First of all, our value is that we interpret statutes faithfully. We don't substitute our judgement for the legislature. You know, you elect your representatives to Lansing and to the United States Congress to make decisions about public policies and we on the bench are not there to substitute our judgement when we disagree with what the legislature does. Unless of course what the legislature does wishes to cross the line between constitutionality and non-constitutionality, and that doesn't happen very often. You know we [p. A206] only put lawyers on the court. And that's not because lawyers have any better sense of right and wrong than say doctors or dentists, it's not because they know how to structure society any better than the tool and die workers or engineers, it's not because they have any superior senses of values, to say, middle managers or truck drivers.

We only put lawyers on the bench because they're trained to read the law, and in our judgement, that's what they have to restrict themselves to doing. And this court is not prepared to second-guess the judgment of the legislature.

Our opponents, the people who quite frankly make a livelihood by suing you and those who you represent, oppose us, perhaps more than any other reason because we have not substituted our judgement for that of the elected representatives of the people specifically on medical malpractice reform. After all, in about 90 other instances tort reform and medical malpractice reform and frivolous lawsuit reforms have been struck down on nearly 100 occasions over the past several years in other state legislatures. Michigan, I believe, is the only state that has upheld medical malpractice

reform. Not because its pro medical malpractice reform again, or anti medical malpractice reform, but because your elected representatives, our elected representatives, are allowed in a free society, a self-governing society, to make those kinds of decisions.

The people who are trying to remove this court hate it because it is prepared to uphold self government, it respects the separation of powers, it recognizes that our system is, in fact, awash in frivolous litigation; litigation designed to make the legal system an accomplice to the exercise of improper leverage in unfair, unjustified settlements.

Number two value: we believe in the freedom of contract for much the same reason. Just as we won't substitute our judgement for your elected representatives in Lansing, we also won't substitute our judgement for your judgement in making professional and personal contracts. And that's because, again, in a free society, as adults, you have the right to structure your relationships in a way that you see fit, without the courts necessarily saying "we could have drawn a better contract, we could have drawn a more fair contract". When those kinds of things happen, when a contract that says 60 days doesn't mean 60 days, when it means 65 days in the case of a sympathetic plaintiff, or maybe 55 days in the case of a less sympathetic plaintiff, we don't have an equal rule of law, and, by the way, I can tell you, overwhelmingly, you are not going to be treated as the sympathetic plaintiff in the kinds of cases that we get.

You are not going to be the ones given the benefit of 65 days, the people who sue you will. We're not unsympathetic to anybody, or particularly sympathetic except to the rule of law. And that is that 60 days means 60 days. And if contracts

or statutes want some kind of exception, they're free to put those exceptions in there, but we as a court of law are not going to read those exceptions into the law. When the rule of law is undermined, we believe that all of us suffer.

Third value we believe in individual responsibility and accountability. What does that mean? That means the kind of values that your parents taught you, that you learned in school, that you grew up with, that almost everybody used to believe as part of this underpinnings of our legal system. It means that in Michigan if you spill hot coffee in your lap you don't come to the court seeking a windfall against the restaurant that served it to you. It means that if you drive drunk in Michigan, you injure yourself, you don't sue the car manufacturer because the car wasn't built like a tank. And it means if you go to a casino in Detroit or Mr. Pleasant , and you loose some money, you don't sue the credit card company because they extended you the credit.

I'll give you another case I had just very recently: there was an automobile accident on a freeway in Detroit, a garbage truck plowed into a car and there were some personal injuries among the passengers of the car, and not surpassingly, they sued. Who did they sue? Did they sue the garbage company? No. Did they sue the driver of the garbage truck? No. They sued the company for whom the garbage truck was hauling away garbage. It's as if the boy doing your lawn on Saturday morning drives away and gets in an accident and the person who suffers the injury sues you because you negligently hired this boy who wasn't a careful enough driver.

[p. A207]

I mean, these are the kinds of cases, ladies and gentlemen, you're seeing in the legal system all around the country. The fact that you're not seeing them increasingly in Michigan is really the phenomenon of the dog that doesn't bark. It's the cases that you're not seeing that are really the great contribution of this court.

Because these cases are the typical currency in the legal system around the country increasingly. This kind of hyper-litigation and the Michigan Supreme Court is not a particularly sympathetic court for that kind of hyper litigation. And let me say there are enormous consequences for your profession here. Not every bad thing that happens to a person is someone else's fault we believe. We judge the reasonableness of conduct by what is known at the time of the accident, not when lawyers have had months or years to think about things that could have been done differently. And we require hard expert evidence, before we're prepared to find that someone has violated an established standard of care. And we're also committed to the idea that attorneys are not to be given free reign to exploit passions and confusions among jury members, or promote careless thinking.

The litigate system is not a system of insurance, and its not a system for redistribution. Rather it's a system for addressing legitimate injuries that are caused truly by the negligence of other individuals. Members of your profession coming before this court will not win every case, but they will be treated fairly in every case, and they will win when the law requires that they win. With all due respect, that has not always been the case in the state of Michigan.

We believe there's another value in constitution of government which means we believe this constitution is essential for limited government, the separation of powers, property rights, tax limits. The constitution again means what is says. We don't believe in government by lawyers where if you don't like some product or if you don't like some practice you can always end-run the democratic process, you can always circumvent the legislature and come directly and find a sympathetic judge.

You know, compare what happened back in the nineteen teens and the nineteen twenties when some people didn't like alcohol. What did we do to get the 18th amendment to our constitution that enacted prohibition? Well we had a debate in the 50, or, 48 states. This debate lasted nearly a decade. We had to debate the congress. We established a consensus in the United States finally when three-quarters of the states agreed to prohibition and the amendment, two thirds of the congress agreed to prohibition amendment, there was a debate, discussion, give-and-take. Compare that to the modern counterpart of prohibition where you find a friendly judge somewhere who's prepared to say that yes, this product ought to be taken off the market. Or that this product ought to be taxed into non-existence.

This is not the kind of constitutional system that this court believes in and we're not prepared, as I say, to end-run the democratic process. And that also means that if the legislature is prepared to enact further malpractice reform, or tort reform, or frivolous lawsuit reform, or any other kind of reform that it sees fit, we will not do anything in our powers to stymie that reform. Indeed, we will support it because that's how decision making, again, is made in a free society.

We believe as another value in stability, and predictability and understandability of the law. Which side of the line does your conduct fall on? You know, when the laws are uncertain, we're all more-or-less under the power of lawyers. Lawyers are the one class that has an interest in an unstable and unclear law and this court is doing everything that it can to clear understandable majority decisions to try to clarify the laws in as many areas as possible.

Um, this is the essence of the rule of law in our judgment that the law be clear. And it's indispensable, in our judgment, for a free society. Let me mention one other value if I can. It's not directly relevant perhaps to the medical profession but I think it is directly relevant to all of you as citizens in our society and that is that this court respects the fact that the first responsibility of government, not merely one of the (), but the first responsibility, of government, is to protect you, your families, your communities, and your neighbors from violent criminal predators. This is why governments were set up in the first place; this is your first civil right. This is the first civil right of all of us. In the 200 or so criminal justice appeals that we get every month from the 83 counties in Michigan, I believe that this court never-ever loses sight of the fact that they're victims. You're not in a courtroom with us, we only see the lawyers, but there are victims, and [p. A208] you try never to fail to recognize that if you undermine or erode or dilute that the first impact on our criminal justice process we will only be creating more and more victims in the future.

I was a prosecutor in Detroit for nearly 5 years, and I can tell you how violent crime affected every aspect of that community: where people live, where they work, where they play, where they walk in the park after night, where their

students have extra-curricular activities after school; it effects everything. And this is a court that takes seriously its obligations it treats the criminal justice system as a search in the truth and not an exercise in gamesmanship.

Ladies and gentlemen, our opponents do not share all of these values. I don't know who our opponents are going to be, they may well be very decent, uh, competent, capable individuals, but given the huge amounts of money they are going to be getting, from the trial lawyers overwhelmingly, I can tell you they do not share our values. There will be two very distinct roads down which this court can go and we need your help to try to see that the status quo is, is, is, (moving). Because if this court can stay together after this election, if we can be maintained as a cohesive entity for (a few years) I promise you will be very proud of this court – it will become a leader court in the United States.

Um, let me tell you a story here if I can, very quickly. There was a man selling donuts on the street and donuts were 50 cents, and every day a well dressed gentleman would come by that kiosk and the donut stand and he put in 50 cents, but he'd never take any donuts out of there. This happened every day, week after week, month after month, year after year, he would put the money and never take any donuts. Finally one day the well-dress gentleman walked by and the donut seller said sir; can I ask you something? The well-dressed gentleman said, well I guess you probably want to know why I've been putting money in every day and never take any donuts for years. And the seller said, "no, I just wanted to tell you the price of donuts has gone up to 75 cents."

I tell you this story, there's a moral to this story, the story is that we're in kind of the position of the donut seller. You

have been tremendously supportive of, of, my best colleagues in the past, and, and I know you've been supportive of us this year, but we're going to need even more support. There's three of us donuts in this race, as opposed to one donut in the past, and we'd really be truly grateful to you for whatever you can do here.

The stakes really are greater than ever before, lawyers are overwhelmingly for (impeaching us), the defense lawyers, quite frankly, have little interest in this, many of them perceiving that their own economic stakes are tied with those of the plaintiff's lawyers.

It's truly a remarkable phenomenon. You're the people who have an interest in this because you're part of the productive sector that is finding yourself on the wrong side of frivolous lawsuits, lawsuits that are not based on the law, lawsuits that are decided on the basis of very confused presentations in the courtroom. If we lose, and the personal injury lawyers win, you lose, and the quality of healthcare in the United States loses, and the legal system loses.

Let me conclude by saying I don't know what cases are going to be emphasized this year by our opponents commercials and advertisements, but I guarantee you September and October of this year, all of you who turn on a TV are going to see the hundreds of showings of 2 or 3 commercials in which there is going to be some individual who suffered disease and injury. These will be tragic and sympathetic victims, victims for whom my heart goes out, and victims for which whom your heart goes out. Victims who have been in your care, in your hospitals, victims who have been in our courtrooms, victims who will blame you and will blame us for being

victims. They will tug at our heartstrings, and the heartstrings of 10 million people in Michigan.

We need your help in responding to these advertisements because we are no less moved by their situation then the personal injury lawyers are, but those kinds of feelings are not how we organize a system of justice. I don't know if it's going to be your patient, or your patient, but I guarantee its going to be one of your patients and it's going to be a very sympathetic situation and we need your assistance in trying to respond to this in a (responsive) way.

[p. A209]

Transcript of Robert Young's Speech at GOP State Convention 8/26/00

...For forty years we have been under the tyranny of judicial overseers, judges who believed they knew better than all the rest of us, how to organize our society, and who were prepared to make all of the major decisions in our lives. This is a supreme court that believes that its role is to interpret the law, not to make it. We believe that the law, there is one law and that it is applicable to everyone: no matter what your background, no matter what your race, what your religion, what your gender, whether you're rich or poor, famous or unknown. We believe that judges should not be the adult supervision for the society. We believe, and we know, how to do that. We know what the meaning of "is" is, we believe that what you reward, you get more of. And so unlike the 40 years of tyranny that we've all experienced, that have awarded stupidity and banality, we support personal accountability. That means that if you're stupid enough to put

hot coffee between your legs and drive, and get burned, you don't come to the Michigan Supreme Court for relief.

When you violate the rules against dumbness, you don't tell anybody, and you certainly don't sue. And this, this, respect and support for personal accountability extends to the criminal law. Unlike our predecessors, who gave a lot of "get out of jail free" cards to people who were fairly and properly convicted, this is a court that believes that if you've been fairly convicted, you don't get out of court on a technicality. Geoffrey Fieger, and his trial lawyer cohorts hate this court. There's honor in that. We need you to work hard for this court this fall, and we need your prayers. When you go out from this convention, tell your friends to vote for justice. Thank you very much.

[p. A210]

OWOSSO
Sunday, Sunday, September 3, 2000
"The Sunday Independence Page 3"

JUSTICE VISITS COUNTY

[Photograph]

MICHIGAN SUPREME COURT JUSTICE Cliff Taylor (right), pausing here with state Rep. Larry Julian, R. Lennon, was honored during a fundraiser on Wednesday morning at the Comstock Inn & Conference Center downtown Owosso, attended by area residents, business people, government leaders and several area judges.

Justice Taylor is seeking a new term on the court Nov. 9, Gov. John Engler appointed him in August 1997, then he won election in 1998. Fellow Justices Stephen Markman and Robert Young Jr., appointed by Gov. Engler to the state Supreme Court, have been nominated by the Michigan Republican Party to run with Taylor on Nov. 7.

This particular race has drawn national attention because of the large amounts of PAC funding and personal contributions to the campaigns of those opposite Justices Taylor, Markman and Young.

Much of that funding to their opponents is from trial; lawyers who may benefit from a liberal Supreme Court. Taylor noted, "Geoffrey Fieger currently has $90 million of lawsuit awards pending in the state Court of Appeals. Also, Justice Taylor said, "one such law firm alone has pledged over half a million dollars to our opponents."

Taylor, of East Lansing, said Michigan's Supreme Court was heralded in the National Review on Aug. 22, 2000 as "one of the finest in the nation" with responsibility for that designation going to recent changes in judgeships.

(Independent Photo/MICHAEL FLORES)

[p. A211]

CASSETTE TRANSCRIPTION OF EXHIBIT L

VOICE: Opponents continue to attack Michigan's Supreme Court, but now they've gone too far. The Detroit News calls the opponents' ads truly vicious, saying the charges are false and silly. The Grand Rapids Press

admonishes Detroit area trial lawyer Marietta Robinson's smear campaign, writing, "Robinson's hard-edged campaign has been degrading to the court and to the public's confidence in Michigan judiciary." Some people will do anything to get elected. No wonder Geoffrey Fieger, Jesse Jackson and the trial lawyers support Robinson, Fitzgerald and Thomas.

VOICE: When you vote, vote for Justices Taylor, Markman and Young. 22,000 Michigan police officers, more than 100 sheriffs and county prosecutors, the Grand Rapids Press, Detroit News, Oakland Press, Saginaw News, Macomb Daily, Monroe Evening News say vote for justice, Justice Cliff Taylor, Justice Stephen Markman, Justice Robert Young.

JUSTICE ROBERT YOUNG: Paid for by Robert Young for justice.

JUSTICE STEVEN MARKMAN: Paid for by Stephen Markman for justice.

JUSTICE CLIFFORD TAYLOR: Paid for by [p. A212] Clifford Taylor for justice.

(REPEATING)

(END OF EXHIBIT L)

[p. A213]

CERTIFICATE OF TRANSCRIPTION

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

I hereby certify the transcription of the foregoing proceedings. These proceedings were recorded on audio tape; said audio tapes were not recorded by me nor under my supervision or control. I certify that this is a full, true, complete and correct transcription of the audio tapes.

/s/ _____
Medina Balderas
Notary Public
Waynenty, Michigan

My Commission expires: 6.11.03

[p. A214]

[PHOTOGRAPH, with caption:
'He's back... And this time he's brought some friends.']

[p. A215-A216]

FITZGERALD, ROBINSON AND THOMAS. FIEGER'S FRIENDS. WRONG FOR MICHIGAN.

You Remember Geoffrey Fieger,
the liberal trial attorney who defended Jack Kevorkian. Fieger ran for Governor and lost, partly because of his soft views on crime.

7000 Prisoners Free,
Fieger suggested that 7,000 current inmates don't belong in prison. He was quickly denounced as "irresponsible" by Jennifer Granholm the Democratic candidate for attorney general.

Detroit Free Press, 9/16/98

Now the liberals and trial lawyers,
like Geoffrey Fieger, are trying to take over Michigan's Supreme Court. Their strategy: elect liberal judges who are soft on crime.

It's the fieger team:
Fitzgerald, Robinson and Thomas.

Thomas Fitzgerald
is the ideological leader of this new team. He has voted to reverse criminal convictions in over 50 cases - including convictions for rapists, child molesters and murderers. Court records prove this.

Marietta Robinson has never even presided over a criminal case or handled the responsibility of being a judge in any court.

Ed Thomas has collected thousands of dollars in contributions from trial lawyers. In fact, he accepted almost $75,000 from one personal injury firm.

Fitzgerald, Robinson and Thomas. Weak on Crime. Wrong for Our Supreme Court. Wrong for Our Children.

[p. A217]

Paid for by the Michigan
Republican State Committee
2121 E. Grand River
Lansing, MI 48912

Not Authorized by Any Candidate Committee

NON-PROFIT ORG.
U.S. POSTAGE
PAID
MICHIGAN
REPUBLICAN
STATE COMMITTEE

[PHOTOGRAPH, with *partially legible* caption:
'He's back... And this time he's brought some friends.']

[p. A218]

[PHOTOGRAPH, with *partially legible* caption:
'Our police make critical judgments each day...']

[p. A219]

But even the police need some back-up.

Justices Taylor, Markman and Young

Supreme Court Justices Cliff Taylor, Stephen Markman and Robert Young are conservative justices who are tough on crime.

That is why they have been endorsed by the Police Officers Association of Michigan and the Fraternal Order of Police.

The Police Officers Association says: "*Justices Taylor, Markman and Young are tough on criminals, tough on people who injure cops and understand the dangers, and the honor of police work.*"

The Fraternal Order of Polices says: "*Justices Markman, Taylor and Young understand that the job of men and women in law enforcement is to protect Michigan citizens from criminals. We wholeheartedly support their re-election to the Michigan Supreme Court.*"

Our police need back-up sometimes. Especially from the bench. And Michigan needs justices who will stand up for the police and prosecutors, the victims of crime and their families.

Justices Cliff Taylor, Stephen Markman and Robert Young.

They make Michigan's Supreme Court the toughest anti-crime court in America.

Return These Conservative Justices to the Michigan Supreme Court

[PHOTOGRAPH, with caption: 'Elect Supreme Court Justices Taylor, Markman and Young.']

[p. A220]

Liberal candidates Robinson, Fitzgerald and Thomas Not on Our Side

Liberal candidates Marietta Robinson, Thomas Fitzgerald and Edward Thomas are Not on Our Side.

Robinson, Fitzgerald and Thomas are Geoffrey Fieger's friends. That explains why they've accepted hundreds of thousands of dollars in campaign contributions from the big trial lawyers.

They're not endorsed by the Police Officers Association or the Fraternal Order of Police. And no wonder.

Thomas Fitzgerald has been overturned more than any other judge on the Court of Appeals, according to one university study. And Fitzgerald voted to overturn more convictions of criminals at the trial court than any other Court of Appeals judge.

Marietta Robinson has never been a judge in any court. Ever!

Overturned.
Soft on Crime.
Liberal. And wrong.
Robinson, Fitzgerald and Thomas.

Not on Our Side.

~~**LIBERAL JUDGES**~~

[p. A221]

Supreme Court Justices Taylor, Markman and Young.
Endorsed by the Michigan Republican Party.

Paid for by the Michigan
Republican State Committee
2121 E. Grand River
Lansing, MI 48912

Not Authorized by Any Candidate Committee

NON-PROFIT ORG.
U.S. POSTAGE
PAID
MICHIGAN
REPUBLICAN
STATE COMMITTEE

**********ECRLOT**C028
THE BADALAMENTE FAMILY
OR CURRENT RESIDENT
44140 RIVERVIEW RIDGE DR
CLINTON TWP, MI 48038-6902

[p. A222]

[PHOTOGRAPH, with caption: 'Forever isn't long enough for a child molester.']

[p. A223]

But to Judge Thomas Fitzgerald, a couple years was apparently enough.

A child molester with a long criminal record.
The defendant had seven prior convictions. His criminal record spanned at least twenty years. This time he was convicted by a Michigan court for molesting a seven-year old girl. A crime he had been convicted of before.

Thomas Fitgerald went easy on the child molester.
Judge Thomas Fitzgerald opposed a tough sentence. He even opposed the minimum sentence of five years recommended by the prosecutor, the probation department and the state sentencing guidelines. Instead Judge Fitzgerald voted to uphold a light two-year minimum sentence.

Thomas Fitzgerald has an established record of being soft on crime.
As an appeals court judge, Fitzgerald has voted to reverse criminal convictions in over 50 cases. In fact, Thomas Fitzgerald has voted to reverse criminal convictions for rapists, child molesters – even someone convicted of murder.

Now Fitzgerald and his liberal friends want to be on the Supreme Court.
Thomas Fitzgerald is running as part of a team, a team that is soft on crime. A team so soft on crime, that one of them has never even presided over a criminal case, let alone handled the responsibility of being a judge. Fitgerald and his friends Marietta Robinson and Edward Thomas are Geoffrey Fieger liberals, They are weak on crime and wrong for Michigan.

For questions regarding these cases, please go to www.migop.org/fitzgerald/

[PHOTOGRAPH with no caption]

Fitzgerald, Robinson, and Thomas. Weak on Crime. Wrong for our Supreme Court. Wrong for our Children.

[p. A224]

Liberal candidates Robinson, Fitzgerald and Thomas Not on Our Side

Liberal candidates Marietta Robinson, Thomas Fitzgerald and Edward Thomas are Not on Our Side.

Robinson, Fitzgerald and Thomas are Geoffrey Fieger's friends. That explains why they've accepted hundreds of thousands of dollars in campaign contributions from the big trial lawyers.

They're not endorsed by the Police Officers Association or the Fraternal Order of Police. And no wonder.

Thomas Fitzgerald has been overturned more than any other judge on the Court of Appeals, according to one university study. And Fitzgerald voted to overturn more convictions of criminals at the trial court than any other Court of Appeals judge.

Marietta Robinson has never been a judge in any court. Ever!
Overturned.
Soft on Crime.
Liberal. And wrong.

Robinson, Fitzgerald and Thomas.
Not on Our Side.

~~**LIBERAL JUDGES**~~

[p. A225]

Supreme Court Justices Taylor, Markman and Young.
Endorsed by the Michigan Republican Party.

Paid for by the Michigan
Republican State Committee
2121 E. Grand River
Lansing, MI 48912

Not Authorized by Any Candidate Committee

NON-PROFIT ORG.
U.S. POSTAGE
PAID
MICHIGAN
REPUBLICAN
STATE COMMITTEE

[p. A226]

MICHIGAN REPUBLICANS
2121 East Grand River Avenue
Lansing, Michigan 48912

"Join the Fight!"

PRESS RELEASE

FOR IMMEDIATE RELEASE
March 3, 2004

CONTACT: Sage Eastman
517-487-5413

Liberal Like Fieger, Sounds Like Fieger, Wrong Like Fieger...Must Be Fieger

Lansing, MI – "she's everything a multi-millionaire trial lawyer like Geoff Fieger would want in a state Supreme Court Justice and everything Michigan families should fear," said MRSC Communications Director Sage Eastman today in response to the announcement that Marietta Robinson is running for the state's highest court as a Democrat.

"With her on the court, trial lawyers like Geoff Fieger will keep getting richer while Michigan families keep footing the bill," Eastman said. "Robinson has opposed reining in the ridiculous multi-million dollar judgments that have ordinary folks wondering what has gone wrong with our judicial system." One of Robinson's personal claims to fame is her own participation as an attorney in multi-million dollar lawsuits.

In her announcement speech, Robinson spoke against a court with a "political agenda," despite having a known personal political agenda well out of the Michigan mainstream. In a *Detroit News* article, Robinson proudly stated that she helped raise money for the nation's leading pro-partial birth abortion PAC (EMILY's List). Robinson's political activities have also included a working relationship with the Michigan Welfare Rights Association, which referred to Republican Governor John Engler as a "genocidal maniac."

"Multi-millionaire trial lawyers are not 'mainstream' Michigan," Eastman confirmed. "Democrats tried running a multi-millionaire trial lawyer in 1998. We liked our odds then, and we like them now."

###

Paid for by Michigan Republican State Committee -
2121 E. Grand River Ave. Lansing, MI 48912-3299

[p. A227]

MICHIGAN REPUBLICAN STATE COMMITTEE
VICTORY LINE
FALL 1999
Vol. 3, Issue 3

Helping Michigan's Children Make the Grade

Inside: Special Education Feature

Chairman DeVos' Mackinac Address

[p. A228]

Page 2, Victory Line 2000
THE COURTS
A Common Sense Conservative Court

There isn't an election cycle in memory that didn't have Republican leaders chanting the familiar mantra: "The Courts! The Courts! We must win the Courts!" ...or something along those lines. This biennial call-to-action probably begins to sound a bit overdramatic election after

election – especially when every subsequent election is hailed as "the most important Election Day ever"– but the truth is, the priority conservatives have traditionally placed on court races is not without warrant.

At the federal level, it's almost certain that the next elected President will be responsible for creating a Supreme Court that could shape America's social and economic direction for several generations. Another Democrat in the White House will spell disaster for hard-fought conservative advances in areas such as welfare reform, affirmative action and, of course, protection of human life under the Reagan Bush judiciary.

In Michigan, liberal judges and justices pose many of the same threats as they do nationally: they jeopardize the essential balance of power between the courts and the legislature. Liberal judges have abused the constitutional separation of powers to the point that courts are turned into virtual super-legislators, usurping power reserved for other branches of government.

A prime example is in the area of tort reform. The virtual explosion of litigation – most of which is frivolous, excessive and very expensive for taxpayers – continues despite concerted efforts to reform the system. Resistance to reforms comes mainly from liberal judges and their trial lawyer association allies, like Geoffrey Fieger who find specious legal reasons to upend reform efforts.

Consider that every year, millions of dollars in higher prices on goods and services are dumped on consumers to pay for lawsuit abuse. U.S. Senator Spence Abraham posited that litigation adds $20 to the cost of a $100 stepladder, $100 to

the cost of a $200 football helmet, and $3,000 dollars to the cost of a heart pacemaker. A report by the Brookings Institute found that consumers are forced to pay an additional $500 on a new car because of litigation costs passed on by automobile manufacturers. And, according to the American Tort Reform Association, the cost of lawsuits is equivalent to $1,200 for every man, woman and child in America.

Trial lawyers like Geoffrey Fieger and liberal judges have a long, drawn-out history of protecting each other's interests. Their cozy arrangement ensures that lawyers can continue their lucrative way of life, and it guarantees liberal judges can keep their jobs. Every year the trial bar "invests" millions...
please see Court, page 8

[PHOTOGRAPH]

SUPREME COURT
STEPHEN J. MARKMAN

This summer, State Supreme Court Justice James H. Brickley announced his intention to step down from the state's highest court – a court on which he served for 17 years. In mid-September, Governor Engler appointed Brickley's replacement.

Judge Stephen Markman comes to the state Supreme Court from his position on the Michigan Court of Appeals – a post to which he was first appointed in 1994 and subsequently reelected because of his impeccable record.

Markman comes to the court with extensive legal and judicial experience. He has served as both a U.S. Attorney and a former Assistant Attorney General of the United States.

A widely published judge, Markman has earned a reputation as one of the finest conservative and constitutional legal minds in America.

Under the state Constitution, Markman is required to stand for election in November 2000, along with conservative Supreme Court Justices Clifford Taylor and Robert Young.

[p. A229]

Page 8, Victory Line 2000
EDUCATION & COURT (continued)

Vouchers: a national trend
continued from page four

...ing schools and transfer those funds (approximately $1,500 annually per pupil) to parents for use in educational alternatives such as private schools. Unfortunately, the Bush proposal could not take effect in Michigan without a state Constitutional amendment.

Republican Steve Forbes also supports voucher initiatives. "No mother in the United States of America should be forced to send her child to a lousy school," says the presidential candidate. "Let parents choose a school that works."

Other Republican presidential candidates including Gary Bauer, Elizabeth Dole, Alan Keyes and John McCain have also supported education initiatives that offer better opportunities via increased parental choice.

There is currently a proposed statewide voucher initiative underway in Michigan. Kids First! Yes! Is the title of the

campaign to place the voucher issue on the 2000 ballot. The referendum, if approved by voters next November, would amend the state Constitution and implement a test voucher plan in those school districts that fail to graduate at least two-thirds of their students. Parents whose children attend third-rate schools would be given vouchers worth approximately $3,000 that could be applied toward any school of choice.

Another key element in Michigan's school choice initiative is mandatory teacher testing, a provision that would be instituted among state school districts whose students fail to meet the threshold of academic acceptability. The concept of mandatory teacher testing has grown in popularity in recent years amid a number of published reports that indicate that a disturbing number of teachers are not adequately trained in the subjects they are teaching.

Not surprisingly, the strongest demand for opportunity scholarships is coming from families within impoverished neighborhoods where many schools are gross underachievers and from parents of average or below-average students. Given this fact, many national pundits have long believed vouchers and school choice initiatives are the best hope for the GOP to win support from minorities.

Sixty-five percent of African Americans between the ages of 26-35 support the use of taxpayer funds to send children to private and religious school –

Source: Joint Center for Political and Economic Studies

For more information on the Kids First! Yes! Ballot initiative, please call 517/485-4865.

Court: Common sense

continued from page two

...to resist reform at any level of government by targeting its extensive resources towards the coffers of liberal judges.

Trial lawyers like Geoffrey Fieger aren't the only ones who can be counted on to invest heavily in judicial races. Mark Gaffney, newly installed president of the Michigan AFL-CIO, has already publicly prioritized the state Supreme Court as a Democrat target. Gaffney intends to paint conservatives' tort reform as a losing issue.

"This may be the year that incumbency for a Supreme Court justice is not to their advantage," commented Gaffney.

Tort abuse is just one of many areas in which liberals have traditionally used the courts to subvert democracy – there are countless others. One thing is clear, liberals are determined to expand the role of the judiciary at all costs. Next year, by electing Justices Robert Young, Clifford Taylor and Stephen markman, conservatives can ensure our laws are upheld and judicial abuses are brought to an end.

[pages A230-A231]

Sitting Justices Should 'Know Better'
Cite this page 14 Mich.L.W. 1859
October 9, 2000
Michigan Lawyers Weekly

To The Editor:

As an attorney who spent the better part of his professional like appealing cases to the Supreme Court and the Court of Appeals, and as one who has followed trends on the Supreme Court for well over 40 years now, I feel compelled to speak out about the campaign for the high court currently being waged by Justices [Stephen] Markman, [Clifford] Taylor and [Robert] Young.

Lawyers may argue from now until dooms-day about the "rightness" or "wrongness" of the decisions of our Supreme Court as currently constituted, but what really concerns and troubles me most are *the ethical implications* of not only Justice Markman's speech before the Michigan State Medical Society (MSMS), but the highly questionable television and radio advertising being aired on behalf of the incumbent justices, and the campaign literature being disseminated on their behalf.

A few examples will make my point.

Canon 2 of the Michigan Code of Judicial Conduct clearly states, "A judge should avoid impropriety and the appearance of impropriety in all activities." It goes on to say, "A judge should promote public confidence in the integrity and impartiality of the judiciary."

In Justice Markman's speech to the MSMS, any fair-minded reading of the text leads to the inevitable conclusion that he and his colleagues will not be impartial when it comes to medical-malpractice cases and other types of tort litigation. He plainly refers to plaintiffs' lawyers as "our opponents" and "the people who quite frankly make a livelihood by suing

you" (referring to the doctors). Can any plaintiffs' attorney appearing before Justice Markman and his fellow justices, regardless of the merits of the case, hope to receive a fair and impartial hearing with that kind of demonstrated attitude? I personally have to doubt it.

Using several extreme examples, he virtually lumps all personal injury cases together and states, "the Michigan Supreme Court is not a particularly sympathetic court for that kind of hyper-litigation." Strangely, I have always thought that our highest court was to look at the merits of each and every case individually, instead of branding a certain class of litigation as unworthy of consideration.

And if you are an attorney before the court questioning the validity of a certain piece of litigation, which our lawmakers in Lansing have chosen to label a "reform," would you feel you would get an *impartial review* of your case from a justice who has declared, on behalf of himself and his fellow justices "...if the legislature is prepared to enact further malpractice reform, or tort reform, or any other kind of reform that it sees fit, we will not do everything in our power to stymie that reform. Indeed we will support it..." If that statement does not clearly convey a predisposition toward a certain class of litigation, then I apparently don't understand the English language.

I was always taught in school that, under our Constitution, the Supreme Court was supposed to be a *third independent branch of government, to act as a check and balance* against the other two, not a rubber stamp for anything the Legislature happens to think up on the spur of the moment. But then, a fine, respected federal judge has already commented on this aspect of the court's activities, last year, but somehow his

remarks – supposedly videotaped – have mysteriously vanished! (*See*, Detroit Free Press article by Brian Dickerson, Nov. 1, 1999.)

In still another portion of his remarks to the MSMS, Justice Markman, on behalf of himself and his colleagues up for re-election, states, "If we lose, and the personal injury lawyers win, you lose..." The clear implication of such a remark obviously is, "If we [Markman, Taylor and Young] win...you [the MSMS] win." Canon 7 of the Michigan Code of Judicial Conduct provides in part that a judge "...should not make pledges or promises of conduct in office" and, further, that a judge "...should not use or participate in the use of any form of public communication...which is likely to create an unjustified expectation about [what] the candidate can achieve." If the quoted remarks are not deliberately designed to convey the thought that the physicians can expect positive results when they find themselves before the current Supreme Court, what else could they logically mean? (*See*, Ethics Opinion JI-27, which holds that a candidate should "not create the impression that, if elected or re-elected, the candidate would act with bias or partiality toward a particular class or group.")

Much more could be said about this rather [p. A231] astonishing speech by a sitting justice. Michigan Lawyers Weekly would indeed do its readers a favor by publishing it in its entirety, and letting the legal profession draw its own conclusions.

Let us now focus attention on the infamous "soft on pedophiles" television ad, which more properly should be called the "Willie Horton Ad Campaign of 2000." Here, we have a highly inflammatory ad directed against an honorable

colleague of the justices, with the obvious intent of defaming and vilifying him before the general public. Truly it is not an overstatement to label this ad as a new low in judicial campaign advertising!

While Justices Markman, Taylor and Young may protest, saying that this was not produced by them but by the Republican State Committee, we all know that it was and it is their ethical duty and responsibility to denounce it and demand its withdrawal. Yet all we hear is silence on their part. Perhaps they should read Ethics Opinion C-219, which would remind them, "...Appeals to passion...inflammatory T.V. spot commercials and other like practices are to be condemned."

And they might also read *Bennett* (403, Mich. 178 (1978)), authored by a principled conservative, former Justice Jim Ryan, who spoke for a unanimous Supreme Court in condemning a judge who made abusive and disparaging remarks about certain attorneys and the justice system in general. The opinion said, "His public disparagement of certain attorneys...and the judicial system itself, must have prejudiced and left many doubtful of the impartiality and effectiveness of the justice system.... The judge's statements ... could only result in diminished public confidence in the independence of the judiciary ... and constitutes conduct clearly prejudicial to the administration of justice."

Finally, there are the radio ads which describe the incumbent justices as taking "a tough stance on crime" and which boast that 75 percent of the prosecuting attorneys in Michigan support Markman, Taylor and Young. Also, there are the so-called "Badge of Honor" and other campaign brochures coming into our homes almost daily, proclaiming

that "Justices Clifford, Taylor, Stephen Markman and Robert Young are tough on criminals, tough on people who injure cops..." and further stating that "Robinson, Fitzgerald and Thomas are Geoffrey Fieger's friends... "and they are not on our side."

Can anyone representing a person accused of a crime hope to receive an impartial hearing from justices with that kind of mindset?

Ethics. Opinion C-219 also speaks out against campaign literature which talks about a "strict sentencing philosophy" and goes on to warn, "Troubled waters arise when the candidate focuses his advertising toward a special interest group," (e.g. police prosecutors, etc.), and concludes: "the appeal can be direct or subtle".

I leave it to others to determine whether all of this warrants an investigation by the Judicial Tenure Commission. But certainly these campaign tactics come very close to crossing the line of an ethical campaign. As Justice Cardozo said back in 1928, "there are many forms of professional misconduct that do not amount to crimes."

In closing, let me say that over the years I have contributed to and voted for both Republican and Democratic candidates for our state's highest court, but I have never witnessed such questionable conduct on the part of sitting justices – all of whom should know better.

There is no other way to say it – it is shameful!

Eugene D. Mossner
Past President, State Bar of Michigan
Past Chairperson, AGC

[p. A232]

WEDNESDAY
NOV. 1, 2000

Roadwork	**2**
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Region/State	**4**
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ON THE WEB
www.freep.com

PHONE 248-586-2600

Section B

BRIAN DICKERSON

Fieger still favorite GOP adversary

[PHOTOGRAPH]

MICHIGAN Republicans had so much fun kicking Geoffrey Fieger's butt two years ago they're trying to do it again.

There's just one problem. Fieger isn't running for anything this year.

If Fieger were a Democratic candidate for the Michigan Supreme Court, I and a lot of other folks would probably vote for his Republican opponent – as we did in 1998, when Fieger challenged John Engler in the gubernatorial race.

That's why three Republicans trying to keep their seats on Michigan's highest court would rather run against Fieger than the three capable Democratic challengers whose names will appear opposite the incumbents' on next Tuesday's state Supreme Court ballot.

So it's the Southfield lawyer's Cheshire grin, not the Democratic state Supreme Court candidates' faces, that adorns the new GOP mailer that began appearing in voters' mailboxes Monday.

Who's on the team?

Michigan Court of Appeals Judge Tom Fitzgerald, Wayne County Circuit Judge Ed Thomas and attorney Marietta Robinson rate a mention only as members of the so-called Fieger team – although what they and Fieger share, beyond a desire to unseat the Republican justices, is unclear.

The mailing brands Fieger as a "liberal trial attorney" – probably the nicest thing he's been called this year – and points out that his "soft views on crime" have been denounced by Democratic Attorney General Jennifer Granholm.

But it's Fieger critic Granholm, not Fieger, whose voice is featured in the Democratic state Supreme Court candidates' most effective advertising spots. Is she on the Fieger team,

too? And if so, why is she saying such nasty things about her coach?

Make no mistake: Fieger has a lot riding on the defeat of the Republican state Supreme Court slate. The justices hate his guts, and they've done everything but hire sky-writers to broadcast that no judgement a Michigan jury awards one of Fieger's clients is safe on appeal.

Justice Cliff Taylor likes to tell audiences that Fieger's clients have $90 million in jury verdicts at stake in appeals pending before the Michigan Court of Appeals. That's a lot of *dinero* – though not nearly as much as the insurance companies who bankrolled the GOP's state Supreme Court takeover have saved since the incumbents began rewriting Michigan tort law 18 months ago.

Justices play Fieger's game

No one knows which, if any, of Fieger's jury verdicts will stand up on appeal if the Republican justices are defeated. But if the incumbents win, Fieger can probably skip the charade of oral arguments before the high court – and a lot more personal injury cases will start flowing to lower-profile trial lawyers.

Fieger may never win the Republican justices' respect. But in this election, at least, they're playing by his rules.

Like Fieger, the Republican justices are fond of proclaiming – on the basis of no discernible authority – that they are the best in the country.

Like Fieger, they are fond of making claims that are demonstrably false to anyone who takes the rouble to read the record.

Like Fieger, they have become an embarrassment to the best people in their party.

And like the trial lawyer they love to hate, they have demonstrated that they will do anything to distract the jury's attention from the weakness of their own case.

Of course, if I had to run on their record, I'd be yelling "Fieger Time!" too.

Contact BRIAN DICKERSON *at 248-586-2607 or dicker@freepress.com.*

[p. A233]

Detroit Free Press
10/27/04, p. 2B

Ads target state Supreme Court justice

By DAWSON BELL
FREE PRESS STAFF WRITER

After a four-year hiatus, the attack ad has returned to campaigns for the Michigan Supreme Court with a salvo aimed at Justice Stephen Markman, one of two incumbents seeking re-election.

The ads harshly criticize decisions made by the court and began to appear this week in TV markets around the state.

They are paid for by the Citizens for Judicial Reform and are being placed by J.L. Barlow & Associates, a Harper Woods agency. A call to Barlow was not returned Tuesday.

The sudden burst of negativity livens up what has been a very low-profile race to date, with Markman, nominated by the Republican Party, and Justice Marilyn Kelly, nominated by the Democrats, leading a field of five candidates for two seats on the state's highest court. The current partisan split on the officially nonpartisan court is a 5-2 Republican majority.

Also running are Brian Zahra, a state Court of Appeals judge nominated by the GOP; Deborah Thomas, a Wayne County Circuit judge nominated by the Democrats, and Leonard Schwartz, a retired Oak Park law professor nominated by the Libertarian Party.

Markman, who ran for election for the first time in 2000 after he was appointed to the court by former Gov. John Engler a year earlier, was one of three justices who withstood an expensive advertising assault made memorable by the tagline "Markman, Taylor and Young, oh my!" In addition to Markman, the attacks were directed at Clifford Taylor and Robert Young and were largely under-written by trial attorneys and the Democratic Party, who objected to the conservative philosophy of the then new majority on the court.

Allies of the Republicans, chiefly the Michigan Chamber of Commerce, in turn pounded Democratic nominees to the court that year. The chamber is running ads again this year and has spent $875,000 to support Markman.

Markman said Tuesday he has not seen the ads, but he called the attack "not unexpected."

The campaign this year has been time-consuming but completely civil, he said, with the candidates attending forums and talking to voters and interest groups.

Bill Ballenger, publisher of the newsletter Inside Michigan Politics, polled voters about the court race earlier this month and found that fewer than one in five could identify any of the candidates running for the court. Markman and Kelly enjoy a significant advantage because they are designated as justices on the ballot.

To learn more about the candidates for Michigan Supreme Court see the League of Women Voters of Michigan voter guide at www.lwvmi.org.

Contact DAWSON BELL *at 313-222-6604 or dbell@freepress.com.*

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

CASE NO. 03-60185

[Filed December 19, 2003]

LINDA GILBERT, et al., Plaintiffs,	)
v.	)
JOHN D. FERRY, JR., et al., Defendants.	)

JUDGES: MARIANNE O. BATTANI, UNITED STATES DISTRICT. JUDGE.

OPINION BY: MARIANNE O. BATTANI

OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Before the Court are Plaintiffs' Motion for Summary Judgment (Doc. # 13-1) and Defendants' Motion to Dismiss (Doc. # 20-1). Plaintiffs brought this 42 U.S.C. § 1983 suit

for declaratory and injunctive relief against four justices of the Michigan Supreme Court and the State Court Administrator of Michigan. The Plaintiffs challenge, on due process grounds, the refusal of the justices to recuse themselves in two cases pending before the Michigan Supreme Court. For the reasons set forth below, the Court finds it lacks subject matter jurisdiction to hear this suit and thereby GRANTS Defendants' motion to dismiss.

I. BACKGROUND AND PROCEDURAL HISTORY

The current dispute arises out of a politically charged dialogue between Plaintiff Fieger, and Justices Corrigan, Taylor, Young, and Markman (hereinafter "the Justices"). Mr. Fieger is a former gubernatorial candidate and a well-known trial lawyer in Michigan. During his career, Mr. Fieger has been an outspoken critic of members of the Michigan judiciary.[1] The Justices, for their part, have censured Plaintiff Fieger and his supporters for espousing liberal views on crime, tort reform, and other controversial

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[1] In 1996, Fieger is reported as criticizing the Michigan Court of Appeals, including then Judge Corrigan, as follows: "they're squirrels, mollusks and lizards...and if they don't like what I am saying about them, let them come down here and tell me." John Larabee, *Kevorkian, Fieger Hog Limelight During Trial*, THE DETROIT NEWS, February 25, 1996, at B1.

On another occasion, Fieger described the judges on the Court of Appeals and the Supreme Court as "fascists." Cassandra George-Sturges, *Michigan's Bad Boy Geoffrey Fieger Unseen and Unheard*, TRIUMPH, Nov.-Dec., 1999, at p. 28.

issues.[2] At a variety of campaign events, the Justices have announced stances that, in the opinion of some, reveal a bias against trial lawyers such as Mr. Fieger.[3] The relationship between Mr. Fieger and the Justices apparently worsened during the 2000 judicial election cycle when groups, such as the Republican Party and the Michigan Chamber of Commerce, sponsored campaign advertisements in favor of the Justices that targeted Mr. Fieger in vitriolic terms. While this campaign material did carry a disclaimer indicating that it was not authorized by any judicial candidate, Plaintiffs claim it was implicitly authorized by the Justices.

Although Mr. Fieger has been involved with as many as thirty-eight cases filed with the Supreme Court, Plaintiffs argue that two recent cases warrant scrutiny. *See Gilbert v.*

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[2] For example, during an address made at the August 2000 GOP State Convention, Justice Robert Young stated:

> We believe that judges should not be the adult supervision for society...And so unlike the 40 years of tyranny that we've all experienced, that have awarded stupidity and banality, we support personal accountability. That means that if you're stupid enough to put hot coffee between your legs and drive, and get burned, you don't come to the Michigan Supreme Court for relief....Geoffrey Fieger, and his trial lawyer cohorts hate this court. There's honor in that.

Aff. of Geoffrey N. Fieger, Ex. H (Doc. # 2-1).

[3] *See, e.g.*, Eugene D. Mossner, Letter to the Editor, Sitting Justices Should Know Better, 14 MICH. L. W. 1859, Oct. 9, 2000 (criticizing the campaign tactics of Justices Markman, Taylor, and Young).

Daimler Chrysler Corp., Civil Action No. 94-409-216-NH (Wayne County Cir. Ct.) [hereinafter Gilbert]; *Patricia Graves and Frank Amedure, Jr., Personal Representatives of the Estate of Scott Amedure v. Warner Brothers*, Civil Action No. 95-494-536-NZ (Oakland County Cir. Ct.) [hereinafter Amedure]. Plaintiffs claim that even though Mr. Fieger did not argue the cases at the appellate level, his involvement at the trial level is enough to provoke the alleged bias of Justices Corrigan, Taylor, Young, and Markman.

In the first case, Gilbert, the Michigan Court of Appeals affirmed a substantial judgment in Plaintiff Gilbert's favor. Subsequently, the Michigan Supreme Court granted leave to appeal. On April 8, 2003, the court issued a unanimous order allowing the Michigan and United States Chambers of Commerce to file briefs separately as *amicus curiae*. On April 16, Ms. Gilbert filed a motion for recusal against Justices Corrigan, Taylor, Young, and Markman, in addition to Justice Weaver, who is not a party to this lawsuit. In a lengthy brief filed in support of her motion, Gilbert argued recusal was necessary because the probability of actual bias, on the part of the Justices, was too high to be constitutionally tolerable. Gilbert identified two possible sources of bias. First, she claimed the Justices had a pecuniary interest in the case because they had received large monetary donations and campaign support from the *amicus curiae*. Second, she contended the Justices' public discourse revealed a deep-rooted animus toward Fieger. Gilbert argued that the Justices' participation in the case not only violated her due process rights, but also undermined the public's trust in the integrity of the Michigan judicial system. Nevertheless, on September 17, 2003, the Justices denied Gilbert's motion for recusal. No

opinion was issued in denying the motion as to Justices Corrigan, Taylor, Young, and Markman.[4]

In the second case, Amedure, the Michigan Court of Appeals reversed a judgment favorable to Plaintiffs Graves and Amedure. Subsequently, the Michigan Supreme Court denied the appellants' application for appeal. Graves and Amedure then filed a Motion for Reconsideration and a Motion for Recusal on the same grounds as in Gilbert. On October 10, 2003, the state court denied both motions.

Plaintiffs initiated the current action on September 5, 2003 under 42 U.S.C. § 1983, alleging that Defendants violated their constitutional right to a fair hearing before an independent and impartial tribunal under the Due Process Clauses of the Fifth and Fourteenth Amendments. Plaintiffs request a variety of relief including: (1) a declaratory judgment that their due process rights have been violated; (2) an injunction preventing the Justices from participating in any case involving Plaintiffs; and (3) an injunction requiring Defendant Ferry to reassign the Gilbert and Amedure cases to a panel of randomly drawn Michigan appellate judges.

On September 8, this Court rejected Plaintiffs' request for a temporary restraining order to bar the Michigan Supreme Court from taking any further action on the Gilbert and Amedure cases. On September 19, the Court denied Plaintiffs' renewed application for a temporary restraining

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[4] Justice Weaver, however, did issue an opinion, explaining her reasons for denying the motion for recusal, that explored the nature and effect of the Michigan Chamber of Commerce's contributions to her reelection campaign.

order and denied Plaintiffs' request to conduct discovery. The parties filed the current motions for summary judgment and dismissal on September 25 and October 2 respectively.

II. STANDARD OF REVIEW

A. Summary Judgment

Federal Rule of Civil Procedure 56© authorizes the Court to grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." There is no genuine issue of material fact if there is no factual dispute that could affect the legal outcome on the issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). In other words, the movant must show he would prevail on the issue even if all factual disputes are conceded to the non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

B. Lack of Subject Matter Jurisdiction

A Rule 12(b)(1) motion addresses whether the Court has authority or competence to hear a case. A defendant may challenge the subject matter jurisdiction alleged by the complaint either facially or substantively. *Gould Elecs., Inc. v. United States*, 220 F.3d 169 (3d Cir. 2000). On a facial attack, the defendant merely questions whether the language of the complaint adequately invokes the court's jurisdiction over the subject matter of the case. A substantive attack, in contrast, goes beyond the complaint and challenges the facts

upon which subject matter jurisdiction depends. "No presumptive truthfulness applies to the factual allegations....In reviewing [substantive attacks], a trial court has wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts." *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990).

III. DISCUSSION

Although the parties present many provocative legal arguments concerning judicial recusal and disqualification, the focus of this opinion will be on the availability of the requested relief and the limits of the Court's subject matter jurisdiction. As discussed below, the absolute judicial immunity doctrine and the Rooker-Feldman doctrine provide separate and independent grounds for dismissing Plaintiffs' claims.

A. The Absolute Judicial Immunity Doctrine

Under the doctrine of judicial immunity, it is well established that judicial officers are absolutely immune from § 1983 suits for monetary damages based on actions undertaken in their judicial capacity. *Mireles v. Waco*, 502 U.S. 9, 11, 116 L. Ed. 2d 9, 112 S. Ct. 286 (1991). By enacting the 1996 Federal Courts Improvement Act (hereinafter the "FCIA"), Congress has expanded the ambit of judicial immunity by amending § 1983 so as to prohibit injunctive relief against a judicial officer.[5] Pub.L. No. 104-

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[5] The FCIA does not shield judicial officers when a (1) "a declaratory decree was violated or declaratory relief was unavailable," or (2) the judicial officer was acting in clear excess

317, § 309, 110 Stat. 3847, 3853 (1996). Absolute judicial immunity applies not only to judges, but also to any person exercising judicial power. *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994) (probate court administrator entitled to judicial immunity because he performed a task "integral or intertwined with the judicial process").

The absolute judicial immunity doctrine was created to encourage uninhibited judicial decision-making. *Stump v. Sparkman*, 435 U.S. 349, 356-57, 55 L. Ed. 2d 331, 98 S. Ct. 1099 (1978). The Supreme Court has emphasized that a judicial officer must be "free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley v. Fisher*, 80 U.S. 335, 347, 20 L. Ed. 646 (1872).

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Pierson v. Ray, 386 U.S. 547, 553-54, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967). Accordingly, judicial immunity "applies even when [a judicial officer] is accused of acting maliciously or corruptly." *Id.*

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of her jurisdiction. Pub.L. No. 104-317, § 309. Neither of these exceptions, however, are applicable to the instant suit.

1. The Justices Are Entitled to Absolute Immunity from Injunctive Relief

In this case, Plaintiffs request the Court to enjoin the Justices from participating in any current or future appeal involving Mr. Fieger. The judicial immunity doctrine, as modified by the 1996 Federal Court Improvement Act, clearly bars this drastic injunctive relief. The Justices are entitled to the full protection of the immunity doctrine because the requested relief is premised on alleged misconduct stemming from the performance of their judicial duties. *See Ackermann v. Doyle*, 43 F. Supp. 2d 265, 271-72 (E.D.N.Y. 1999) (finding that New York Supreme Court Justice was absolutely immune from injunctive relief based on decisions made while presiding over federal plaintiff's state court action).

2. Defendant Ferry Is Entitled to Immunity

Plaintiffs also request the Court to enter an injunction requiring Defendant Ferry to reassign the Gilbert and Amedure cases to a randomly drawn panel of appellate judges. The absolute judicial immunity doctrine extends to Defendant Ferry as well, because he was made a party to this lawsuit solely by virtue of his role as State Court Administrator.[6] *See Rodriguez v. Weprin*, 116 F.3d 62, 67 (2d

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[6] The inclusion of Mr. Ferry as a defendant in this lawsuit is puzzling. Contrary to Plaintiffs' complaint, there is no evidence that Mr. Ferry has any links with the Michigan Chamber of Commerce. *See* First Am. Bill of Compl., paras. 24, 25 (Doc. # 6-1). Nor is there any record that he has publically expressed personal or professional animus concerning Mr. Fieger. Therefore, it is doubtful that Mr. Ferry contributed to the alleged due process violation.

Cir. 1997) (law clerk performing scheduling duties entitled to absolute immunity). The Sixth Circuit has held that clerks and other judicial employees who act under "the direction of a judge [are] performing a function to which absolute immunity attaches." *Foster v. Walsh*, 864 F.2d 416, 417 (6th Cir. 1988) (citations omitted). As State Court Administrator, Mr. Ferry acts under the "supervision and direction" of the Michigan Supreme Court when he performs his duties of regulating the Michigan Supreme Court's calender. *See* MICH. COMP. LAWS § 225(2), MCR 8.103. Since Mr. Ferry was performing an essential judicial function, under the direction of the Michigan Supreme Court, when he scheduled the Graves and Amedure cases, he is absolutely immune from injunctive relief. Bush, 38 F.3d at 847.

B. The Rooker-Feldman Doctrine

The Rooker-Feldman doctrine divests all federal district courts of subject matter jurisdiction to review state court judgments. *See generally Rooker v. Fid. Trust Co.*, 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149, (1923); *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983); *Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386, 390 (6th Cir.2002). The doctrine reflects the principle set forth in 28 U.S.C. § 1257 that the United States Supreme Court is the exclusive federal court with jurisdiction to review state court decisions. Accordingly, the doctrine prevents district courts from entertaining challenges to state court decisions, "even if those challenges allege that the state court's action was unconstitutional." Feldman, 460 U.S. at 486.

The Rooker-Feldman doctrine promotes firmly-held notions of federalism and comity by preserving the integrity

"of the state court decision-making process" and "the repose of state court judgments." *Adkins v. Underwood*, 520 F.2d 890, 892-93 (7th Cir. 1975). Our federalist system of government relies on the capacity of both state and federal courts to protect the constitutional rights of litigants. Atl. *Coast Line R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 286, 26 L. Ed. 2d 234, 90 S. Ct. 1739 (1970) (finding that our dual system of government "could not function if state and federal courts were free to fight each other for control of a particular case"). Allowing federal district courts to review Michigan decisions could have the deleterious effect of "displacing almost the whole of state litigation into the federal courts by making the final judgment in the state court the cause of action that kicks off a suit to undo that judgment in federal court." *Lynk v. Laporte Superior Court No. 2*, 789 F.2d 554, 563 (7th Cir. 1986).

Consistent with these federalism and comity concerns, the Rooker-Feldman doctrine raises a jurisdictional bar that prevents federal district courts from second-guessing state court decisions. *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1142 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1, 95 L. Ed. 2d 1, 107 S. Ct. 1519 (1987). The doctrine prohibits federal courts from engaging in appellate review of not only state court judgments, but also of any claim "inextricably intertwined" therewith. *Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386, 390 (6th Cir. 2002). "In practice this means that when granting relief on the federal claim would imply the state-court judgment on the other issues was incorrect, federal courts do not have jurisdiction." *Pieper v. Am. Arbitration Ass'n*, 336 F.3d 458, 460 (6th Cir. 2003) (citation omitted).

There is one exception to the Rooker-Feldman doctrine. A federal court may exercise jurisdiction "where the plaintiff's claim is merely 'a general challenge to the constitutionality of the state law applied in the state action,' rather than a challenge to the law's application in a particular state case." *Hood v. Keller*, 341 F.3d 593, 597 (6th Cir. 2003) (citation omitted). In determining whether this general challenge exception applies, federal courts "'cannot simply compare the *issues* involved in the state-court proceeding to those raised in the federal-court plaintiff's compliant,' but instead 'must pay close attention to the *relief* sought by the federal-court plaintiff.'" *Id.* (quoting *Bianchi v. Rylaarsdam*, 334 F.3d 895, 900 (9th Cir. 2003)). If the requested relief seeks to undo the effect of a state court decision, then the federal court lacks subject matter jurisdiction. *Feldman*, 460 U.S. at 486.

Since the application of the Rooker-Feldman doctrine to this case would necessarily result in dismissal, the parties have deeply contested the mechanics of the doctrine. Defendants contend the doctrine bars review of Plaintiffs' due process claims, because they have either been ruled upon by the Michigan Supreme Court or are inextricably intertwined with other state proceedings. Plaintiffs respond by offering several justifications for not applying the doctrine. First, Plaintiffs argue the doctrine is not triggered by state court rulings on motions for recusal. Second, Plaintiffs contend the doctrine does not apply to Plaintiff Fieger's independent constitutional claim, because he was not a party to the state proceedings. Finally, Plaintiffs argue their suit falls within the general challenge exception to the Rooker-Feldman doctrine because it seeks to question the constitutionality of Michigan's recusal procedures. The Court will address each of these arguments in turn.

1. The Rooker-Feldman Doctrine Is Applicable to this Case

From the outset of this litigation, both parties have been concerned with the operation and effect of the Rooker-Feldman doctrine. At a hearing held on September 4, 2003, Plaintiffs requested the Court to enter an emergency restraining order to enjoin the Michigan Supreme Court from taking any further action in the pending cases. Plaintiffs' counsel specifically requested the restraining order to prevent the triggering of the Rooker-Feldman doctrine:

> If the [Michigan] Supreme Court denies [the motions], any federally protected rights that this Court might be able to intervene and safeguard will be lost under the Rooker-Feldman Doctrine. That's why it's important for this Court to grant a temporary restraining order to preserve the *status quo ante* and to protect its own jurisdiction. . .

Tr. of Mot. for T.R.O., p. 5 (Doc. # 7-1). Plaintiffs' fears were realized shortly after this hearing when the Michigan Supreme Court ruled on the motions for recusal and reconsideration in Gilbert and Amedure. Therefore, taking Plaintiffs' own argument at face value, the Rooker-Feldman doctrine divested the Court of subject matter jurisdiction once the Michigan Supreme Court denied the motions.[7]

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[7] While the Rooker-Feldman doctrine did not act to bar the Court's jurisdiction before the Michigan Supreme Court entered its rulings, Defendants have argued persuasively that the related doctrine of Younger abstention would have required an identical result. *See Hayse v. Wethington*, 110 F.3d 18, 20 (6th Cir. 1997) (finding that Younger abstention prohibits federal district courts

As Plaintiffs forecasted, this suit has become a *de facto* appeal of the decisions of Justices Corrigan, Taylor, Young, and Markman to participate in the Gilbert and Amedure cases. The same due process arguments for recusal have been asserted in state and federal court.[8] Namely, it is alleged that (1) the Justices had an improper pecuniary interest in the Amedure case because the Michigan Chamber of Commerce had donated millions of dollars to their election campaigns; and (2) the Justices were unable to impartially perform their judicial duties because they had expressed personal and professional animus toward Mr. Fieger. The essence of Plaintiffs' federal complaint is that the high probability of bias violated their due process rights. Since there is no possible avenue by which the Court could reach this conclusion without explicitly holding that the Michigan Supreme Court wrongly decided the motions for recusal, the Rooker-Feldman doctrine prohibits the Court from exercising its subject matter jurisdiction. *Catz v. Chalker*, 142 F.3d 279, 293 (6th Cir. 1998).

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from exercising jurisdiction over pending state court orders). However, the Court need not reach this issue, because once the state court entered its decisions the Rooker-Feldman doctrine occupied the field. Plaintiffs should not be afforded special leeway simply because they initiated this suit on the eve of the Michigan Supreme Court's decisions, over four months after they filed the motion for recusal in Gilbert.

[8] Not only do Plaintiffs submit the same legal arguments, but they also assert the same factual basis for the alleged bias. For instance, Plaintiffs have proffered an affidavit by Mr. Fieger, cataloguing the allegedly improper conduct and statements of the Justices, that is word-for-word identical to an affidavit submitted during the state proceedings. Aff. of Geoffrey N. Fieger (Doc. # 2-1).

Pursuant to the Rooker-Feldman doctrine, the Michigan Supreme Court's rulings on the motions for recusal and reconsideration are conclusive unless they are "modified or reversed in the appropriate appellate proceeding." Ackermann, 43 F. Supp. 2d at 272-73 (relying on the Rooker-Feldman doctrine to dismiss a claim that New York Supreme Court justices unconstitutionally presided over a case) (citation omitted). This is not to say, however, that the Constitution does not provide Plaintiffs with a federal forum to present their claims. As Plaintiffs conceded during oral argument, they may avail themselves of a writ of certiorari to the United States Supreme Court. Tr. of Mot. for T.R.O., p. 9 (Doc. # 7-1). *See also Blanton v. United States*, 94 F.3d 227, 234 (6th Cir. 1996) (holding that only the United States Supreme Court had the power to review a determination by the Tennessee Supreme Court on a matter of attorney licensing and discipline).

2. The Michigan Supreme Court's Denial of the Motions for Recusal and Reconsideration Constitute Final Judgments for the Purposes of the *RookerFeldman* Doctrine

Plaintiffs have taken the position that the Rooker-Feldman doctrine is inapplicable because the Michigan Supreme Court has not entered final judgment on the merits of their cases. At oral argument, Plaintiffs' counsel argued the denial of the motion for recusal in Gilbert was an "interlocutory order" that was not "final" because the state court could reverse it at any time. Tr. of Mot. Hr'g, p. 25 (Doc. # 44-1). Even assuming, for the purposes of discussion only, that motions for recusal are properly categorized as interlocutory orders, the Rooker-Feldman doctrine remains applicable. The Sixth Circuit has recently adopted the majority view that the Rooker-Feldman doctrine bars federal district courts from

reviewing interlocutory orders, just as it prohibits review of final state court judgments on the merits. Pieper, 336 F.3d at 462.

Plaintiffs' argument is also flawed in that it creates an artificial distinction between final decisions on the merits of cases and final decisions on motions for recusal. Under the RookerFeldman doctrine, "the form of the [state] proceeding is not significant. It is the nature and effect which is controlling." *Feldman*, 460 U.S. at 482 (quoting In re Summers, 325 U.S. 561, 567, 89 L. Ed. 1795, 65 S. Ct. 1307 (1945)). The nature and effect of the Michigan Supreme Court's rejection of the motions for recusal and reconsideration is undoubtedly final. *See Chafin v. West Virginia Supreme Court of Appeals, slip op.*, 1998 WL 1297605 at *4 (S.D.W.Va. Dec. 18, 1998) (holding that decisions by West Virginia supreme court justices not to recuse themselves constituted final "adjudications" protected by the Rooker-Feldman doctrine). No other state mechanism exists for Plaintiffs to contest the state court's rulings on the motions. Thus, the state court's denial of the motions must be regarded as a final decision that triggers the Rooker-Feldman doctrine. To hold otherwise would upset firmly entrenched notions of federalism and allow interference with any undecided case on the docket of the highest court in Michigan.

3. Plaintiff Fieger's Claim Must Also Be Dismissed.

Plaintiffs argue that even if the Court were to conclude the Rooker-Feldman doctrine bars the due process claims of Plaintiffs Gilbert, Graves, and Amedure, the same conclusion does not extend to Plaintiff Fieger, because he was not a party

to the state court proceedings.[9] Plaintiffs correctly explain that in *United States v. Owens*, 54 F.3d 271, 274 (6th Cir. 1995), the Sixth Circuit held that the Rooker-Feldman doctrine does not bar a suit by a federal plaintiff who was not a party in a preceding state action. However, the Court is hesitant to interpret the Owens decision in a manner that would allow a federal plaintiff, dissatisfied with a state court ruling, to avoid the Rooker-Feldman doctrine by including their trial attorney as a co-plaintiff. *See Lemonds v. St. Louis County*, 222 F.3d 488 (8th Cir. 2000) ("federal court plaintiffs cannot by artful pleading obtain a hearing of a disguised state court appeals that would otherwise be subject to a Rooker-Feldman bar").

In Owens, the United States Postal Service requested an order from a federal district court enjoining the execution of a writ of mandamus issued by the Ohio Court of Appeals. 54 F.3d at 274. The Postal Service had attempted to participate in the state court proceedings, but its motion to intervene was denied. *Id.* The federal court defendant sought to dismiss the Postal Service's suit by invoking the Rooker-Feldman doctrine. The Sixth Circuit rejected this argument and reasoned that the doctrine did not apply, because the Postal Service was not a party to the action in the Ohio courts and had no opportunity to litigate its claims. *Id.*

The circumstances of the instant case do not require the Court to read the Owens decision so narrowly as to exclude Plaintiff Fieger from the effects of the Rooker-Feldman doctrine. He was the moving party for the motions for

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[9] While Plaintiffs raise this argument in their reply brief in support of their motion for preliminary injunction, the Court will address it for the sake of completeness.

recusal, in effect, if not in name. Mr. Fieger was more than a passive participant in the Michigan Supreme Court proceedings. For instance, he signed an affidavit in support of the motions for recusal in which he catalogued a variety of statements and conduct that he believed formed the foundation of the Justices' animus toward him. Indeed, it was his very involvement in the case that Plaintiffs argue gave rise to the issue of bias. Consequently, the federalism and comity interests underlying the Rooker-Feldman doctrine require the Court to find that it has no subject matter jurisdiction over Mr. Fieger's constitutional claim.

A different conclusion would be warranted, perhaps, if Mr. Fieger were asserting a cognizable due process claim that is independent from that of his clients. However, the manner in which Plaintiff Fieger's claim has been presented makes clear that only the due process claims of Plaintiffs Gilbert, Graves, and Amedure are the foundation of this lawsuit.[10] In the only discussion of Mr. Fieger's due process claim in the pleadings, Plaintiffs explain that since Mr. Fieger "has a vested, contractual and financial interest in the outcome of both cases[,]...he has the *same right* to a fair hearing by an impartial tribunal as the named parties to the State Court litigation." Pls.' Reply Br. to Defs' Answer to Mot. for Prelim. and Perm. Inj., p. 2 (Doc. # 39-1) (emphasis added). This statement demonstrates that Mr. Fieger is either reasserting the due process interests of his clients or

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[10] The tenuous nature of Mr. Fieger's claim is reflected in Plaintiffs' characterization of it as a mere "secondary question." Mot. for Prelim. and Perm. Inj., p. 2 (Doc. # 2-1). If Mr. Fieger believes he has a viable claim, he may file a separate suit where his due process interests, whatever they may be, form the "primary question" presented.

predicating his claim on the rights of his clients to a fair and impartial tribunal.[11] No authority has been presented to support this novel theory that a lawyer may champion the due process rights of his clients in the same suit where his clients are co-plaintiffs.

4. The Current Suit Does Not Qualify as an Exception to the *Rooker-Feldman* Doctrine

In their remaining argument, Plaintiffs attempt to bring their case within the general challenge exception to the Rooker-Feldman doctrine. That is, Plaintiffs assert they are challenging the constitutionality of Michigan's recusal procedures for supreme court justices. *See, e.g.*, Tr. on Mot. Hr'g, pp. 34-35, 54-55 (Doc. # 44-1). Accordingly, Plaintiffs claim they are not seeking appellate review of the Michigan decisions, but are instead requesting prospective relief to establish a "methodology" for the Michigan Supreme Court to constitutionally hear cases involving Plaintiff Fieger. Pls.' Br. in Supp. of T.R.O., p.1 (Doc. # 3-1).

Plaintiffs' assertion, that they are bringing a general constitutional challenge to establish a new "methodology" for judicial disqualification, is not consistent with the relief they request. *See Auto. Club of Michigan v. Stacey*, 750 F. Supp. 259, 260 (E.D.Mich 1990) (finding the RookerFeldman doctrine barred federal plaintiffs' request for both a

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[11] It would be peculiar if Mr. Fieger were alleging *he* had a right to a fair tribunal. Assuming this is the case, Mr. Fieger must view himself as a "party" before the Michigan Supreme Court, since this is the only tribunal to which he could be referring. Therefore, even under this interpretation, Owens does not foreclose the application of the Rooker-Feldman doctrine.

declaration that state court judge violated their constitutional rights by failing to dismiss their case and an injunction to permanently enjoin the judge from participating in other cases involving the plaintiffs). Instead of seeking a revision of Michigan's recusal procedures that would protect the rights of all litigants, Plaintiffs seek narrow relief, individualized to the adverse rulings they received in the state proceedings. Namely, Plaintiffs request injunctions that would undo the effect of the Michigan Supreme Court's rulings on the motions for recusal and reconsideration by removing the Gilbert and Amedure cases from the state court's docket, and reassigning them to a new panel of judges.

The Fifth Circuit discussed an analogous situation in *Howell v. Supreme Court of Texas*, 885 F.2d 308, 312 (5th Cir. 1989). In that case, the Fifth Circuit found the Rooker-Feldman doctrine barred a federal district court from evaluating a § 1983 plaintiff's claim that individual justices of the Supreme Court of Texas had violated his due process rights. *Id.* Howell claimed the justices improperly refused to disqualify themselves despite the fact that they "harbored a personal bias or prejudice toward" him or because "the impartiality of ...[the] justices might reasonably be subject to question." *Id.* at 310. The court rejected Howell's attempt to couch his federal suit as a general challenge to Texas' recusal procedures:

> Although Howell frames his claim in this proceeding as a challenge to Rule 15a, the substance of the claim is that the justices' interpretation of the rule and refusal to recuse themselves under it violated Howell's due process rights. The due process issue was explicit in Howell's Motion to recuse and was necessarily rejected by the justices in denying his motion.

Id. at 312. Accordingly, the Fifth Circuit held the Rooker-Feldman doctrine created an insurmountable jurisdictional bar, because Howell's claim was "inextricably intertwined" with the denial of his motion for recusal. *Id.*

Similarly, this Court may not evaluate Plaintiffs' "challenge," because it is "inextricably intertwined" with the decisions of Justices Corrigan, Taylor, Young, and Markman's to not recuse themselves. Although Plaintiffs did not question the constitutionality of a specific Michigan court rule in the state proceedings, the due process concerns Plaintiffs now raise in support of their "challenge" were explicit in the motions for recusal and reconsideration. *Id.* Therefore, allowing Plaintiffs to reassert their due process claims in federal court would run afoul of the Rooker-Feldman doctrine's prohibition of collateral attacks on state court decisions.

An argument could be made that it is unclear whether the Michigan Supreme Court actually considered Plaintiffs' due process claims, because there is no procedural rule requiring the Justices to issue an opinion to supplement an order denying a motion for recusal. A similar argument was recently raised and rejected by the Ninth Circuit in *Bianchi v. Rylaarsdam*, 334 F.3d 895 (9th Cir. 2003). The Bianchi plaintiff filed a federal civil rights suit seeking an injunction vacating an adverse decision by a panel of California Court of Appeal justices and reassigning his case to be heard by a different panel. *Id.* at 898. The plaintiff claimed the appellate justices were biased against him and violated his due process rights by refusing to recuse themselves. *Id.* at 899. As in Howell, the Ninth Circuit determined that the Rooker-Feldman doctrine barred district court review because the plaintiff's constitutional claims were inextricably intertwined

with the state court's rulings. *Id.* at 899-01. The Ninth Circuit found that the silence of the California justices in denying the plaintiff's motion for recusal "did not indicate that they failed to consider the constitutional claims presented to them." *Id.* at 900. Moreover, the court held that it was "immaterial" that the justices did not specify their reasons for denying plaintiff's motion, because the injury alleged in the federal suit resulted from the state court's judgment. *Id.* at 900-01 (citation and footnote omitted).

For the reasons articulated by the Ninth Circuit, the silence of the Michigan Supreme Court does not warrant a rejection of the Rooker-Feldman doctrine by this Court. Plaintiffs' constitutional claims were part and parcel of the motions to recuse that were considered and rejected by the Michigan justices. Certainly, there may be compelling reasons for creating a procedural rule requiring justices to articulate their reasons for refusing to disqualify themselves. In particular, such a rule would do much to advance the Michigan Supreme Court's appearance of impartiality. The decision to enact such a rule, however, appropriately lies with Michigan's judicial officers. *See Family Independence Agency v. Kucharski (In re J.K.)*, 468 Mich. 202, 661 N.W.2d 216, 227 (2003) (Weaver, J., nonparticipation statement).

III. CONCLUSION

For the reasons set forth above, the Court GRANTS Defendants' Motion to Dismiss and DENIES Plaintiffs' Motion for Summary Judgment.

IT IS SO ORDERED.

/s/ _____
MARIANNE O. BATTANI
UNITED STATES DISTRICT JUDGE

APPENDIX K

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-1207

[Argued January 28, 2005, Decided March 10, 2005, Filed March 10, 2005]

LINDA GILBERT, et al., Plaintiffs-Appellants,

v.

JOHN D. FERRY, JR., et al., Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Michigan at Ann Arbor No. 03-60185-Marianne O. Battani, District Judge

JUDGES: Before: BOGGS, Chief Judge; KENNEDY and MARTIN, Circuit Judges.

OPINION

KENNEDY, Circuit Judge. The Plaintiffs filed this § 1983 action against four justices of the Michigan Supreme Court, seeking a declaration that the Defendant justices'

failure to recuse themselves from two cases pending before the Michigan Supreme Court violated their Fourteenth Amendment due process right to a fair hearing before an impartial tribunal because the justices were biased against them.[1] The district court dismissed the action for lack of subject matter jurisdiction on the basis of the *Rooker-Feldman* doctrine, holding that since the Plaintiffs had raised the same due process arguments they now raise in this § 1983 claim in motions for recusal filed against the Defendant justices in state court, which the justices denied, it could not conclude that the Plaintiffs suffered a due process violation without concluding that the justices wrongly decided the motions for recusal. In response, the Plaintiffs argued that the *Rooker-Feldman* doctrine did not apply because they filed this § 1983 claim before the justices denied their motions for recusal. The district court held that, even if the *Rooker-Feldman* doctrine did not bar its exercise of jurisdiction when the Plaintiffs filed

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[1] The Plaintiffs also named John Ferry, Jr., the State Court Administrator of Michigan, as a defendant. The Plaintiffs requested an injunction mandating Ferry to remove the two cases at issue from the Michigan Supreme Court's docket and to re-assign them to a special docket to be heard by a panel of Michigan Court of Appeals judges. The district court correctly concluded that Ferry, who is responsible for regulating the Michigan Supreme Court's calender, is absolutely immune from injunctive relief under the judicial immunity doctrine. *Gilbert, et al., v. Ferry, Jr., et al.*, 298 F. Supp. 2d 606, 612 (E.D. Mich. 2003). The Plaintiffs do not appeal this conclusion. Insofar as the Plaintiffs seek a declaration that Ferry violated their due process right to a fair hearing by failing to remove the cases from the Court's docket, their position is without merit, as Ferry has no power to remove and re-assign cases, but rather works solely under the supervision and direction of the Michigan Supreme Court.

this action, it nonetheless would have abstained from entertaining the Plaintiffs' suit on the basis of the *Younger* abstention doctrine. We agree with the conclusions reached by the district court, and AFFIRM.

BACKGROUND

Plaintiff Fieger, a well-known trial lawyer in Michigan, represented Plaintiffs Gilbert, Graves, and Amedure in civil actions filed in the Michigan state court system. Plaintiff Feiger secured a substantial judgment in favor of Plaintiff Gilbert against DaimlerChrysler Corporation, and, in a separate civil action, secured a substantial judgment in favor of Plaintiffs Graves and Amedure against Warner Brothers Corporation. Both judgments were appealed. In *Gilbert v. Daimler-Chrysler Corp.*, 2002 Mich. App. LEXIS 1168, 2002 WL 1767672 (Mich. Ct. App. July 30, 2002) (per curiam), the Michigan Court of Appeals affirmed the judgment in Gilbert's favor. DaimlerChrysler then applied for leave to appeal to the Michigan Supreme Court, which was granted by a unanimous Order entered on April 8, 2003. *Gilbert v. Daimler-Chrysler Corp.*, 468 Mich. 883, 661 N.W.2d 232 (2003). That order also permitted the Michigan and the United States Chambers of Commerce to file briefs separately as *amicus curiae*. *Id.* On April 16, Gilbert filed a motion for recusal against Justices Corrigan, Taylor, Young, and Markman. In a lengthy brief in support of her motion, Gilbert argued that recusal was necessary because the probability of actual bias on the part of the justices was too high to be constitutionally tolerable. Gilbert identified two sources of potential bias. First, she claimed that the justices had a pecuniary interest in the case because they had received large monetary donations and campaign support from the

amicus curiae.[2] Second, she asserted, the justices' public discourse revealed a deep-rooted animus toward Plaintiff Fieger.[3] On September 17, 2003, the justices denied Gilbert's motion for recusal.

In the second case, *Graves, et al., v. Warner Bros., et al.*, 253 Mich. App. 486, 656 N.W.2d 195 (2002), the Michigan Court of Appeals reversed a judgment favorable to Plaintiffs Graves and Amedure. The *Graves* plaintiffs then requested leave to appeal to the Michigan Supreme Court, which was denied. Thereafter, Graves and Amedure filed a motion for recusal against the Defendant justices, alleging the same grounds for recusal as were raised in the *Gilbert* motion for recusal. On October 10, 2003, the Defendant justices denied the motion.

The Plaintiffs initiated the current action on September 5, 2003, nearly five months after Gilbert filed her motion for recusal, but two weeks before the Defendant justices denied

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[2] The Plaintiffs allege that Justices Young, Markman, and Taylor received approximately three million dollars in campaign contributions from one, or more, of their *amicus curiae*. They allege that receipt of these funds, and the expectation of future, similar, campaign contributions, constitutes a direct pecuniary interest in the outcome of Gilbert's case.

[3] For instance, during an address made at the August 2000 GOP State Convention, Justice Robert Young is alleged to have stated: "We support personal accountability. That means that if you're stupid enough to put hot coffee between your legs ... and get burned, you don't come to the Michigan Supreme Court for relief. ... Geoffrey Fieger, and his trial lawyer cohorts hate this court. There's honor in that."

this motion. In support of this § 1983 action for violation of their due process right to a fair hearing before an impartial tribunal, the Plaintiffs raise the same arguments that they raised in their motions for recusal, namely, that the Defendant justices were biased against them because they had a pecuniary interest in the *Gilbert* case because the Michigan Chamber of Commerce, appearing before the justices as an *amicus curiae*, donated millions of dollars to their respective campaigns, and because the justices expressed personal and professional animus toward Mr. Fieger. After oral argument on the parties' respective motions for summary judgment, the district court granted the Defendants' motion to stay discovery. The Plaintiffs filed a motion for reconsideration of that order, which the district court denied. Thereafter, the district court issued an opinion and order granting the Defendants' motion to dismiss. *Gilbert*, 298 F. Supp. 2d 606. This appeal followed.

ANALYSIS

I. Order Staying Discovery

Before considering whether the district court properly dismissed this action, we must first address the Plaintiffs' complaint concerning the district court's order to stay discovery. The Plaintiffs argue that this order prevented them from developing the facts necessary to establish subject matter jurisdiction. When a defendant challenges a court's actual subject matter jurisdiction, as opposed to the sufficiency of the allegations of subject matter jurisdiction in the complaint, the parties must be given an opportunity to secure and present relevant evidence to the existence of jurisdiction. *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988). The Plaintiffs, however, fail to explain what evidence

relevant to subject matter jurisdiction they were denied from obtaining. Rather, they merely assert that it was an "abuse of discretion for the district court to have forbidden the depositions of key non-party witnesses, whose testimony was critical to a fair resolution of the issues." Nowhere do they inform us as to what witnesses were necessary, how their testimony was critical, or even to what issues they would address. In the portion of their brief in which they argue that the district court erred in failing to grant them declaratory relief, they do complain that, as a result of the limited discovery afforded them, they were unable to uncover the full extent of the amount of "soft-money" the justices' campaigns received, nor the identities of all contributors. This, however, has nothing to do with whether the district court had subject matter jurisdiction.

Here, the Defendants argued that the district court either lacked subject matter jurisdiction on the basis of the *Rooker-Feldman* doctrine or was required to abstain from exercising its jurisdiction on the basis of the *Younger* abstention doctrine. Thus, only facts relating to those two issues were relevant for determining the Defendants' motion to dismiss for lack of subject matter jurisdiction. The facts necessary to the former issue dealt with whether the Defendant justices had already decided the same issues presented by the current suit, while the fact necessary to resolve the latter issue dealt with whether there were ongoing state proceedings involving the same legal and factual issues as those presented in this case. The facts relevant to the analysis of these issues were never in dispute.[4]

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[4] The Plaintiffs' complaint filed in this matter alleged that Plaintiff Gilbert had an ongoing appeal pending before the Michigan Supreme Court; that the Defendants were members of that court and in a position to decide the appeal; that they had granted a

Not only do the Plaintiffs not articulate any factual issue related to the subject matter jurisdiction issues asserted by the Defendants and considered by the district court on which they were denied an opportunity to secure evidence, the Plaintiffs also had a considerable opportunity to secure and present evidence of jurisdiction. They were able to secure and present evidence relating to jurisdiction after they filed their complaint, during the time they prepared their response to the Defendants' motion to dismiss, and while they were preparing their motion for summary judgment. Therefore, we conclude that the district court did not abuse its discretion in ordering a stay of discovery after the filing of the parties' motions for summary judgment.

II. *Rooker-Feldman* Doctrine and *Younger* Abstention

A. *Rooker-Feldman*

The district court dismissed the Plaintiffs' claim for lack of subject matter jurisdiction on the basis of the *Rooker-Feldman* doctrine. It noted that the Plaintiffs raised the same issues in both their motion for recusal and in their § 1983 claim, namely 1) that the justices had an improper pecuniary interest in the *Gilbert* case because the Michigan Chamber of Commerce had donated millions of dollars to their election campaigns, and 2) that the justices were unable to perform their judicial duties impartially because they had expressed personal and professional animus toward Mr. Fieger. The

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motion for the Michigan Chamber of Commerce to participate as an *amicus curiae* in that case; and that plaintiff Gilbert had filed a motion for recusal, requesting these Defendants to recuse themselves from hearing the case for the same reasons as set forth in this federal complaint.

court concluded, then, that it could not hold that the Plaintiffs had suffered a due process violation on the ground that they would not receive a fair hearing before an impartial tribunal without holding that the Defendant justices wrongly decided the motions for recusal.

We analyze a district court's conclusion that the *Rooker-Feldman* doctrine divested it of subject matter jurisdiction under a de novo standard of review. *Anderson v. Charter Township of Ypsilanti*, 266 F.3d 487, 491 (6th Cir. 2001). The *Rooker-Feldman* doctrine prohibits federal courts below the United States Supreme Court from exercising "appellate jurisdiction over the decisions and/or proceedings of state courts, including claims that are 'inextricably intertwined' with issues decided in state court proceedings." *Executive Arts Studio, Inc., v. City of Grand Rapids*, 391 F.3d 783, 793 (6th Cir. 2004) (citations omitted). This circuit has held that a "federal claim is 'inextricably intertwined' with a state-court judgment and thus implicates *Rooker-Feldman* when 'the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.'" *Id. See also Exxon Mobil Corp. v. Saudi Basic Indus.*, 364 F.3d 102, 104 (3d Cir. 2004), *cert. granted*, 160 L. Ed. 2d 221, 125 S. Ct. 310 (Oct. 12, 2004) (No. 03-1696) ("Because Congress has conferred jurisdiction to review a state court's decision only on the Supreme Court, *see* 28 U.S.C. § 1257, lower federal courts lack the power to decide claims in which 'the relief requested . . . requires determining that the state court's decision is wrong or . . . voiding the state court's ruling.'" (citations omitted)); *Mandel v. Town of Orleans*, 326 F.3d 267, 271 (1st Cir. 2003) (noting that the *Rooker-Feldman* doctrine is "premised on the rule that . . . only the U.S. Supreme Court has authority to invalidate state civil

judgments. . . . The doctrine is widely used by the federal courts to prevent end-runs around state judgments.").

The Plaintiffs argue that the *Rooker-Feldman* doctrine does not apply to divest the district court of subject matter jurisdiction here because at the time they filed their complaint in this case (on September 5, 2003) there had been no state judgment or order, and thus nothing that the *Rooker-Feldman* doctrine prohibited the district court from reviewing.[5] *Dubuc*

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[5] The Plaintiffs' argument that a state court's order that is issued after the filing of a federal complaint cannot divest a district court of its jurisdiction on the basis of the *Rooker-Feldman* doctrine was the only argument that they raised in their main brief concerning the application of the *Rooker-Feldman* doctrine. However, in their reply brief, the Plaintiffs raise two additional arguments as to why the *Rooker-Feldman* doctrine does not divest the district court of its jurisdiction in this case. First, they repeat an argument presented to the district court, namely, that a denial of a motion to recuse is not a "final" judgment, and therefore, the *Rooker-Feldman* doctrine should not apply. However, as the district court correctly noted, this court in *Pieper v. American Arbitration Association*, 336 F.3d 458, 462 (6th Cir. 2003), held that the *Rooker-Feldman* doctrine prohibits district courts from reviewing not only final state court judgments on the merits, but also interlocutory orders. Second, they argue, the *Rooker-Feldman* doctrine should not apply because decisions rendered by biased judges should be considered void. In essence, the Plaintiffs ask us to carve out an exception to the *Rooker-Feldman* doctrine and permit the district courts to sit in review of state court judgments and orders when a party alleges that the judges who decided her issue were biased against her. We decline to do so, for in such a case, the party's recourse is the same as that of all those parties who were unable to file a claim in federal district court on account of the *Rooker-Feldman* doctrine, to petition for a writ of certiorari from the United States Supreme Court.

v. Mich. Bd. of Law Examiners, 342 F.3d 610, 619 (6th Cir. 2003) (noting that the *Rooker-Feldman* doctrine did not apply because no state judgment had been issued regarding the issue the plaintiff raised to the federal district court). By the time the Michigan Supreme Court issued its order denying Plaintiff Gilbert's motion for recusal (on September 17, 2003), the district court was already vested with subject matter jurisdiction, and the Defendant justices' order denying the motions to recuse, the Plaintiffs assert, could not operate to divest the court of the jurisdiction that it already possessed. In support of their position, the Plaintiffs note that with respect to diversity jurisdiction, subsequent conduct by the parties, such as changing one's domicile, cannot divest the court of its jurisdiction. Similarly, the Plaintiffs argue, the Defendants should not be able "by their own unilateral acts" to "escape being bound by the jurisdictional facts as they existed at the time the complaint was filed." However, even if we were to find that the Defendant justices' orders issued subsequent to the filing of the Plaintiffs' complaint did divest the district court of its subject matter jurisdiction on the basis of the *Rooker-Feldman* doctrine, it would not be the result of any unilateral acts of the Defendants. Rather, the basis of the dismissal would be the result of a decision on the *Plaintiffs'* own motions for recusal. The inevitable consequence of the Plaintiffs filing motions for recusal, and not withdrawing them after they filed their federal complaint, is that the Defendant justices would decide the motions.

The district court, in response to the Plaintiffs' argument that a state order issued subsequent to the filing of a federal complaint cannot divest a district court of its jurisdiction, made two arguments. First, it noted, the Plaintiffs, on September 4, 2003, specifically requested the district court to enter an emergency restraining order to enjoin the Michigan

Supreme Court from taking any further action in the pending case to prevent the triggering of the *Rooker-Feldman* doctrine. Specifically, the Plaintiffs asserted, "If the [Michigan] Supreme Court denies [the motions], any federally protected rights that [the district court] might be able to intervene and safeguard will be lost under the *Rooker-Feldman* doctrine." The district court further noted that the Plaintiffs' fears were realized shortly thereafter when the Michigan Supreme Court ruled on Plaintiff Gilbert's motion for recusal on September 17, 2003. The district court concluded: "Therefore, taking Plaintiffs' own argument at face value, the *Rooker-Feldman* doctrine divested the Court of subject matter jurisdiction once the Michigan Supreme Court denied the motions." We would not conclude, however, simply because the Plaintiffs expressed concern that the *Rooker-Feldman* doctrine might apply to divest the district court of its jurisdiction once the motions to recuse were decided, that the Plaintiffs were therefore either bound by that opinion or waived their right to argue that, since the motions to recuse were decided *after* they filed their complaint in federal court, the *Rooker-Feldman* doctrine did not divest the district court of its jurisdiction.

The district court also noted, and we agree, that once the Michigan Supreme Court decided the motions to recuse, this suit became a de facto appeal of those decisions, regardless of when the Plaintiffs filed the present action. Plaintiffs raised the same due process arguments in their motions for recusal as they do in this suit, so that the district court could not conclude that the Plaintiffs suffered a due process violation without finding that the motions to recuse were decided incorrectly. The *Rooker-Feldman* doctrine forbids this action. *Executive Arts*, 391 F.3d at 793. The doctrine, based upon principles of abstention and res judicata, promotes firmly-held

notions of federalism and comity by preserving the integrity "of the state court decision-making process" and "the repose of state court judgments." *Adkins v. Underwood*, 520 F.2d 890, 892-93 (7th Cir. 1975); *see also United States v. Owens*, 54 F.3d 271, 274 (6th Cir. 1995). It is consistent with these principles to conclude that, despite the fact that the Plaintiffs filed this claim before the motions to recuse were denied in state court, the *Rooker-Feldman* doctrine nonetheless divested the district court of its subject matter jurisdiction once the motions to recuse were denied. *See Exxon Mobil*, 364 F.3d at 105 (concluding that the filing of a federal claim before a state court judgment is reached "does not escape *Rooker-Feldman*'s grasp. The only timing relevant is whether [a] state judgment precedes a federal judgment on the same claims."). As the *Exxon Mobil* court noted:

> Were we to find that the *Rooker-Feldman* [doctrine] . . . did not apply to federal actions filed prior to the state court's final judgment, we would be encouraging parties to maintain federal actions as "insurance policies" while their state court claims were pending. This defeats an "elementary principle" underpinning the *Rooker-Feldman* doctrine -- 'that a party's recourse for an adverse decision in state court is . . . ultimately [to] the Supreme Court under § 1257, not a separate action in federal court.

Id. (citations omitted).[6]

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[6] The concern that a party may attempt to maintain her federal action as an insurance policy while her state court proceedings were pending is especially acute here where the Plaintiffs filed this federal claim nearly five months after they filed their motions to recuse in state court.

B. *Younger* Abstention

Even if we were to conclude that the *Rooker-Feldman* doctrine did not divest the district court of its jurisdiction when the motions to recuse were decided in state court, we would still affirm the dismissal of the Plaintiffs' claim on the district court's alternative theory, *Younger* abstention. Generally, the *Younger* abstention doctrine counsels a federal court to abstain from adjudicating a matter properly before it in deference to ongoing state proceedings. *Tindall v. Wayne County Friend of the Court*, 269 F.3d 533, 538 (6th Cir. 2001). For purposes of determining whether a district court should abstain from exercising its jurisdiction on the basis of the *Younger* doctrine, we consider 1) whether the underlying proceedings constitute an ongoing judicial proceeding, 2) whether the proceedings implicate important state interests, and 3) whether there is an adequate opportunity in the state proceedings to raise a constitutional challenge. *Id.* The Plaintiffs do not even cite *Younger* or any case relating to the doctrine, let alone raise an argument contesting the application of the *Younger* abstention doctrine. In any event, upon our own review, we conclude that all three factors were met. The motions for recusal against the Defendant justices certainly constituted ongoing judicial proceedings at the time the federal complaint was filed; important state interests, such as when and under what circumstances Michigan Supreme Court justices should recuse themselves, were implicated; and the Plaintiffs had an adequate opportunity to raise their constitutional challenge, as evidenced by the fact that their lengthy brief in support of their motion to recuse contained the same arguments and proofs as presented in their complaint filed in federal court.

For the foregoing reasons, we AFFIRM.